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IN THE

Supreme Court of the United States

October Term, 1977

No. 77- 77-608

LOUIS NIZER, DOUBLEDAY & CO., INC. and FAWCETT PUBLICATIONS, INC.,
Petitioners,

v.

MICHAEL MEEROPOL and ROBERT MEEROPOL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners Louis Nizer ("Nizer"), Doubleday & Co., Inc. ("Doubleday") and Fawcett Publications Inc. ("Fawcett") respectfully pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, which reversed a judgment of the United States District Court for the Southern District of New York summarily dismissing respondents' claim for statutory copyright infringement on the grounds that the defense of fair use had been established.* The claim was based upon the petitioners' quotation of brief excerpts

* The Court of Appeals affirmed the summary dismissal of all of respondents' other claims. (*Vide infra*, p. 7)

from old and previously published letters in their book, *The Implosion Conspiracy*, a study of the infamous *Rosenberg-Sobell* espionage case.

The Court of Appeals, by permitting this remaining claim to go to trial, sanctioned the attempt by the respondents (the children of Julius and Ethel Rosenberg) to suppress comment by petitioners on matters of legitimate public and historial concern, through a deliberate misuse of the Copyright Law. This decision will most certainly have a "chilling effect" on the First Amendment rights of the petitioners and on the willingness of future historians, authors, and commentators to utilize primary source materials to support valid beliefs on matters of public interest which may be contrary to those held by the copyright proprietor.

The notion that First Amendment considerations can outweigh copyright considerations is consistent with numerous decisions by this Court in other areas of the law, most notably in the fields of libel and invasion of privacy, where this Court has held that a public figure's property interest in reputation and privacy must be subordinated to First Amendment considerations. No less of an accommodation should be required of a person's property interest in his copyright. The proper balance between the First Amendment rights of the author-defendant and the legitimate property rights of the copyright proprietor-plaintiff, has never been defined by this Court.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is set forth in Appendix A.* The opinion of the District Court dismissing respondents' claim for statutory copyright infringement is reported at 417 F. Supp. 1201 (S.D.N.Y. 1976) and is set forth in Appendix B.

Jurisdiction of This Court

The judgment sought to be reviewed was entered on July 28, 1977 and is set forth in Appendix C.** The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Where the defendant has written on a matter of legitimate public concern and, in support of his presentation has made very limited use of copyrighted original source materials, whether the First Amendment requires that the interest of the copyright proprietor be subordinated to the defendant's right to speak effectively and the public's concommitant right to be fully informed.

2. Whether, in view of the undisputed and documented facts, the Court of Appeals misconstrued the requirements

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* References to the appendices are prefaced with the appendix letter followed by the page number. (e.g. A12, B15). Page references followed by the suffix "a" are to the appendix on the appeal to the Second Circuit.

** On October 13, 1977, on the petitioners' motion, and over the respondents' strenuous opposition, the Court of Appeals recalled its mandate and stayed its reissuance pending this petition. That order is set forth in Appendix D.

of the defense of fair use in reversing the District Court's summary dismissal of respondents' statutory copyright claim.

Statement of the Case

The Parties and the Two Publications

Respondents are the children of Julius and Ethel Rosenberg, who were convicted of conspiracy to commit espionage and executed on June 19, 1953 (2a). Petitioners Louis Nizer, Doubleday and Fawcett are the author and publishers of the hard and soft cover editions of *The Implosion Conspiracy*. *The Implosion Conspiracy* is an analysis of the trial and post-conviction events of the Rosenberg case.

In the final portion of his book dealing with the post-conviction period, Mr. Nizer in *The Implosion Conspiracy* quoted brief excerpts from letters* written by Julius and Ethel Rosenberg to each other and to the outside world while they were under sentence of death. The letters had been published twenty years earlier in a copyrighted book entitled *Death House Letters of Julius and Ethel Rosenberg ("Death House Letters")* only days before the Rosenbergs' execution. At the time *The Implosion Conspiracy* was published, *Death House Letters* had concededly been out of print for those same twenty years and no sales of *Death House Letters* had taken place since June 30, 1956 (99a, 222a). The financial records of the long-dissolved publisher, Jero Publishing Co.,** and its alleged successor

* Each excerpt was identified as such and its source given. There is therefore no issue of plagiarism or appropriation.

** "Jero" is a contraction of the initials of Julius and Ethel Rosenberg.

(The Rosenberg Children's Trust Fund) established that the total gross income from sales of *Death House Letters* was only $12,000 (220-21a).

The Respondents' Letters Were Public Documents from the Outset

The letters in *Death House Letters* were not and were never intended to be the private correspondence of two anonymous individuals. Rather the letters were written by the Rosenbergs following the most famous criminal trial of this century for the *express purpose* of calling the attention of the world to the alleged injustice of their conviction and the sentence of death, and thereby, in an effort to obtain executive clemency. As the record clearly indicated, many of the letters had been previously published in newspapers sympathetic to the Rosenberg's political beliefs. (See exhibits 2-8 to affidavit of George Berger in opposition to plaintiffs' motion for a preliminary injunction, sworn to June 26, 1973.) As respondents themselves conceded in their own book entitled *We Are Your Sons*:

> "our parents [recognized] . . . the fact that the courts were not impartial arbiters of justice but would rule on their appeals in response to political pressures. Our parents came to feel that getting their story before the public was their only hope. (p. XI)
>
> • • •
>
> "our parents came to realize that their correspondence could be used as aids in the campaign to save them." (p. XII)

Indeed, as respondents' own brief to the Court of Appeals admitted:

> "Uncontroverted evidence demonstrated that Ethel and Julius Rosenberg intended the letters for publication." (p. 49)*

As is evident from a reading of *The Implosion Conspiracy*, the brief quotations were used by Mr. Nizer for three distinct purposes: (1) as historical facts in themselves for the reason that they were an integral part of an international campaign to secure clemency (See B22); (2) to give the reader an insight into those two public figures as individuals, a young mother and father of two small children, living under sentence of death, whose writing achieved a lasting eloquence; and (3) to provide an emotional base to support his own view that capital punishment in that case was unwarranted.

As Judge Tyler observed in an opinion denying respondents' motion for a preliminary injunction,

> "As I read *The Implosion Conspiracy* the quotations were used with discretion and with demonstrable purpose to illustrate from an historical and legal point of view, the post-conviction appeals and petitions for clemency which were filed by and for Mr. and Mrs. Rosenberg. The relevant portions of the book almost certainly will provide reasonably valuable source material for future historians, biographers and social scientists." 361 F. Supp. 1063, 1068 (S.D.N.Y. 1973).

* This is further confirmed by Walter and Miriam Schneir who wrote in *Invitation to an Inquest* (which respondents consider to be the definitive work on the Rosenberg case [263a]): "When the [post-conviction] campaign on their behalf began, the Rosenbergs agreed to the publication of some of the letters . . . to aid their cause . . . ." (p. 213)

Respondents Have Exploited the Courts for an Ulterior Purpose. Their Declared and Revealed Purpose in Bringing This Action Was Twofold: To Launch a Nationwide Campaign to Reopen Their Parents' Conviction and to Suppress, by Means of the Copyright Law, Petitioners' Stated Conclusion That There Was Sufficient Evidence to Convict Their Parents of Conspiracy to Commit Espionage

On the twentieth anniversary of the execution of the Rosenbergs, respondents launched a propaganda campaign to reopen their conviction with the filing of the instant lawsuit, which was designed to give that campaign colorable legal substance and a vehicle for publicity (See affidavit of George Berger in opposition to respondents' motion to transfer, sworn to October 6, 1976, ¶9). While the complaint contains claims for copyright infringement, libel, invasion of privacy and common law copyright,* it has been clear from the very outset that this action was never intended to secure relief for these alleged wrongs. Rather, it was merely part of a plan to launch a nationwide campaign to overturn the conviction of their parents, to vilify Chief Judge Irving Kaufman and everyone connected with the original prosecution of the Rosenbergs in the 1950's and to finance that campaign (and this lawsuit) by public solicitations and mass rallies (*id.*; affidavit of George Berger in opposition to respondents' motion for a certificate pursuant to Rule 54[b], ¶6).**

* The claims for libel and invasion of privacy were dismissed by Judge Harold Tyler on a motion for summary judgment, 381 F. Supp. 29 (S.D.N.Y. 1974). The claim for common law copyright infringement was dismissed by Judge Gagliardi without opinion. The dismissals of these claims were affirmed by the Court of Appeals (A4-12, A22) and are not the subject of this petition.

** The magnitude of the publicity that respondents have received as a result of this lawsuit is evidenced by the 95 press clippings annexed as exhibits to the affidavit of George Berger, sworn to October 9, 1974, in opposition to respondents' motion for a certificate pursuant to Rule 54(b) (Document 85[a] in Record on Appeal).

It has also been clear from the outset that respondents' real quarrel with petitioners was *not* that they had infringed upon any copyright, libeled them or invaded their privacy, but rather that *The Implosion Conspiracy* had concluded that Julius and Ethel Rosenberg had received fair treatment in the federal courts (see page 486 of *The Implosion Conspiracy*). Thus, more than one month before the lawsuit was commenced, in letters dated May 10, 1973 to petitioners Nizer and Doubleday (later annexed as exhibits D and E to the complaint), respondents' counsel revealed his true purpose:

> "I was thus shocked to read . . . the basic thesis of your book, that the Rosenbergs received a fair trial from the courts and prosecution and that the facts warranted the convictions . . . . [The Rosenberg] case . . . culminated in an inexcusable departure from our concept of fair administration of the criminal law, an episode of which the bar will be ashamed for generations to come." (28a-29a)

The following excerpt from a widely published article based on an interview with respondents by a reporter for the Associated Press in March 1974, is typical of plaintiffs' efforts to misuse this lawsuit to achieve their real purpose:

> "They are coming out to clear the names of their parents whom they claim were innocent and were murdered, not executed, by the United States on June 19, 1953 for passing atomic bomb information to the Russians.
>
> "As a first step, the brothers appeared in a television documentary investigating the Rosenberg case. They are also suing author-lawyer Louis Nizer for $3 million for copyright infringement and invasion of

> privacy in his recent book on the case *'The Implosion Conspiracy.'* " (See Document 85[a] in Record on Appeal)

The most blatant and outrageous example of respondents' complete identification of this case with their campaign to reopen their parents' case occurred on the appeal which is the subject of this petition. After filing a notice of appeal from the dismissal of the complaint, respondents, on September 30, 1976 moved to transfer the appeal from the Second Circuit to any other Circuit. Incredibly, the grounds for the motion was a call for a Congressional investigation of the conduct of the Rosenberg trial by then District Judge Irving Kaufman and therefore, that since Judge Kaufman was now Chief Judge of the United States Court of Appeals, every other member of the Court was tainted.

The respondents' moving affidavit left no doubt but that from the very outset the claim of copyright infringement was merely an excuse to gain access to a public forum. Respondents there baldly stated:

> "The thrust of the book [*The Implosion Conspiracy*] is an attempt to justify the conduct of the trial judge and the prosecution and to establish the guilt of the Rosenbergs . . . (Perlin aff. ¶9).
>
> "The members of this court are long-time associates, friends and consultants of Judge Kaufman, and whether they will it or not they must be aware that how they rule on this appeal will so far as Judge Kaufman is concerned, be deemed a decision for or against him, regardless of the nature of the legal issues." (Perlin Aff. ¶35)

In its opinion denying respondents' motion to transfer the appeal, the Court of Appeals observed that respondents

have been "seeking to retry issues of the Rosenberg case rather than direct [themselves] to the issues" (p. 3 of unpublished opinion dated November 23, 1976).

Respondents subsequently requested Mr. Justice Marshall to issue a Certificate of Necessity pursuant to 28 U.S.C. §291. This application was denied on January 18, 1977, 50 L. Ed. 2d 729. Despite these orders rejecting the respondents' claims, and while the instant appeal was before the Court of Appeals, this campaign against Chief Judge Kaufman was carried forward through full page demagogic and false advertisements in the New York Sunday Times of June 19, 1977, page 18E and the New York Law Journal of June 28, 1977, page 5, thereby implementing respondents' belief that "political pressures" can influence the outcome of the appellate process (See page 5 *supra*). These advertisements even solicited contributions from the public, allegedly to finance their campaign.

The conclusion is inescapable that if Mr. Nizer had agreed with respondents that the Rosenbergs did not receive a fair trial, this action would never have been brought, regardless of how many excerpts from the *Death House Letters* had been quoted.

Indeed, Judge Gagliardi had no difficulty discerning respondents' real motivations behind this lawsuit and their reason for choosing Mr. Nizer as the target. In his opinion granting summary judgment dismissing the claim for statutory copyright, he observed:

> "[P]laintiffs claim that at trial they will be able to show that the defendants' book is not a historical work and thus is not entitled to the protection of the fair use doctrine .... Plaintiffs' voluminous and vehement submission on this point gives the distinct impression that what is really desired is a trial of the accuracy and fairness of defendants' book and its implicit conclusion that the controversial Rosenberg trial was fair—an issue on which history alone must provide the final judgment." (B15)

In respondents' hands, the Copyright Law has become an instrument to suppress petitioners' rights to voice an opinion concerning the fairness of the Rosenbergs' trial in the United States courts contrary to their own and to deter others from expressing similar views. It has also provided the platform from which respondents have launched and kept alive their vendetta against the distinguished Judge Kaufman and the federal judiciary.

The Decisions Below

On July 20, 1976, Judge Gagliardi granted petitioners' motion for summary judgment dismissing the statutory copyright claim on the grounds of fair use.* Moreover, with respect to Nizer and Doubleday—as to whom respondents had waived a jury—the Court held "as the trier of the facts" that the use of the letters in *The Implosion Conspiracy* had been fair (B30).

In addition, Judge Gagliardi commented squarely upon the question presented by this petition:

> "There is also another related factor which should here be mentioned. Information about public figures

* Although petitioners had a number of other affirmative defenses to that claim, including lack of standing, consent and public domain, the motion to dismiss was based solely on the defense of fair use to eliminate any possibility of factual issues.

and their reactions to the events of which they were a part is essential to the full and free discussion of those events by subsequent historians or anyone else who has an interest in them. To the degree that a public figure is the subject of historical research or attention, his family may have an interest in seeing him portrayed only in the most favorable light. In this kind of situation there is thus an inherent danger that members of the family of a historical figure may use a copyright on his writings as a means of suppressing unfavorable information or comment about him by later writers rather than for the legitimate protection of their proprietary interest in his intellectual product. Concern about this kind of misuse of the copyright laws was expressed by the concurring judges in *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra,* who noted:

> '. . . it has never been the purpose of the copyright laws to restrict dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity.' 366 F.2d at 311.

While not an important factor in the decision here, the potential for misuse of the copyright laws with respect to letters of historical figures is an additional reason for construing the fair use doctrine liberally in cases like this one." (B29)

The District Court thereby attempted to achieve a proper balance between the First Amendment and the Copyright Law through a liberal application of the fair use defense to works of this kind. Although this was a constitutionally permissible approach, as hereinbelow demonstrated, the issue should be determined directly, untrammeled by the common law of fair use and its criteria. Applying either approach, petitioners must prevail.

On appeal the Court of Appeals for the Second Circuit reversed, holding that the defense of fair use could not be determined on a motion for summary judgment. The Court of Appeals did not address itself specifically to the First Amendment issue raised in Judge Gagliardi's opinion.

Reasons for Granting Certiorari

The question of the relationship between the First Amendment and the Copyright Laws is an important one which has never been passed upon by this Court. See *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.,* 558 F.2d 91, 95 (2d Cir. 1977); Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. Rev. 1180, 1185 (1970). However, the lower courts and at least one commentator have suggested that in certain common situations, the First Amendment requires that the property interests of the copyright holder must be subordinated to the defendant's right of free speech and the public's right to be fully informed. It would be difficult to conceive of a case where the First Amendment considerations weigh more heavily than they do here.

The Court of Appeals for the Second Circuit has stated that the copyright laws may not be used by the copyright proprietor to suppress information regarding matters of general public interest. Thus, in the concurring opinions in *Rosemont Enterprises, Inc.* v. *Random House, Inc.,* 366 F. 2d 303 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967), Judges Lumbard and Hays focused squarely on the First Amendment question presented in this petition:

> "The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.
>
> Such undisputed facts as were before the district court seem to me to point to the existence of a scheme developed by Hughes and his attorneys and employees to prevent the publication of any biography of Hughes and, in particular, the Random House biography. 366 F.2d at 311-12.

The "undisputed facts" in the instant case justify the same conclusions. Before the petitioners published their book, other authors of books on the Rosenberg case had freely employed excerpts from the *Death House Letters* without any objection by respondents and without the payment of any royalties. However, unlike Mr. Nizer, most of the authors had concluded that the Rosenbergs were innocent.* Mr. Nizer, with the perspective of nearly fifty years of experience as a trial and appellate lawyer, read the same materials and concluded that there was sufficient evi-

* *See,* e.g., John Wexley, *The Judgment of Julius and Ethel Rosenberg,* pp. 79, 104, 105, 106, 107, 109, 110, 124, 141, 195, 196, 197, 198, 200, 201, 233, 242, 648; Virginia Gardner, *The Rosenberg Story,* pp. 53, 103, 112, 114. Both of these books were acknowledged by Mr. Nizer in *The Implosion Conspiracy.* In addition, excerpts from the letters were copied in *The Press and the Cold War,* by James Aronson (p. 61), one of the trustees of the Rosenberg children's Trust Fund whose deposition was taken by petitioners (219a).

Finally, in *Invitation to an Inquest* by Walter and Miriam Schneir, the authors devote an entire chapter (19) to quotations from *Death House Letters* to support their theory of the Rosenberg's innocence. The respondents have repeatedly hailed this book as the definitive work on the case (263a), thereby implicitly endorsing the view that the letters are important to any "serious study" of the Rosenberg case (B5).

dence to support the guilty verdict (p. 486). Plaintiffs now are attempting to use the copyright laws to suppress that unfavorable conclusion and to choke off the petitioners' constitutional right to express it. In cases such as this, the First Amendment requires that the respondents' rights to any copyright protection must yield to the petitioners' right to express his opinion on a controversial issue and the public's right to have the benefit of Mr. Nizer's views on this matter.

There is also another related reason to grant certiorari in this case. Professor Nimmer has suggested that First Amendment considerations may outweigh copyright considerations where, in works of substantial public interest, it is the prior author's "form of expression", as opposed to merely his underlying idea which is meaningful.

> "In general, the democratic dialogue—a self-governing people's participation in the marketplace of ideas —is adequately served if the public has access to an author's ideas, and such loss to the dialogue as results from inaccessibility to an author's 'expression' is counterbalanced by the greater public interest in the copyright system. But this conclusion requires reappraisal if there are certain areas of creativity where the 'idea' of a work contributes almost nothing to the democratic dialogue, and it is only its expression which is meaningful. It has been said that 'a work of art cannot be described; it can only be experienced.' This is obviously true, as anyone who attempts to describe the 'idea' of the Mona Lisa or of Michelangelo's Moses must realize." Nimmer, 17 U.C.L.A. L. Rev. at 1185.

This article was cited with approval by the Court in *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.,* 558

F.2d at 95 where the Circuit Court, albeit in a different context, observed that the Courts will someday have to determine the proper relationship between the copyright laws and the First Amendment.

While Professor Nimmer's discussion on this point is directed to graphic works, such as the copyrighted Zapruder film of President Kennedy's assassination (See *Time, Inc.* v. *Bernard Geis Associates,* 293 F. Supp. 130 [S.D.N.Y. 1968]),* the logic of his reasoning would encompass literary works as well.**

We submit that the letters of Julius and Ethel Rosenberg are perfect illustrations of what Professor Nimmer had in mind. The letters are concededly historical facts and of legitimate public interest (B22). Moreover, it is the "form of expression" used by the Rosenbergs in these letters and not the idea alone which is meaningful. As the affidavit of respondents' attorney in opposition to petitioners' motion for summary judgment conceded:

> "A reading of these letters, composed and written by two persons over a period of years awaiting execution in the Death House in Sing Sing Penitentiary, has *emotional impact* upon the reader in the language of the persons involved expressing a very moving narration of their feelings, attitudes and impressions while confronted with a death sentence and the power,

* That case was summarily decided on the basis of the defense of fair use. Professor Nimmer feels it should have been decided on the basis of the First Amendment. 17 U.C.L.A. at 1200-01.

** For example, assuming Lincoln had copyrighted his Gettysburg Address, it could hardly be denied, that for the same reasons expressed by Professor Nimmer, copyright considerations could not be allowed to prevent someone writing a book on the Civil War from quoting this highly literary speech.

> authority and weight of the State arrayed against them. *These letters represent writings of high literary quality."* (254a-255a) (emphasis added)

Moreover, this "emotional impact" (which is obviously what the Rosenbergs sought to convey and what Mr. Nizer also tried to preserve for the reader) is conveyed only by the form of expression itself and cannot be summarized or described any more than the emotional impact of Michelangelo's Moses can be conveyed by anything less than a photograph. To paraphrase Professor Nimmer, the letters themselves—"the 'expression of the idea'—made all the difference." Nimmer, *supra* at p. 1198. Without it the emotional impact is lost.*

As the foregoing authorities intimate, the First Amendment often presents problems in the field of copyright law which cannot be resolved by the mere mechanical application of the traditional defense of fair use—a defense which applies generally to situations having none of the above special considerations. Indeed, they make it clear that the First Amendment may require a verdict for defendants in a copyright infringement action, even where application of the fair use doctrine may result in a contrary conclusion.**

* As above indicated, this emotional impact also supported the petitioners' thesis that capital punishment was inappropriate in that case.

** For example, according to Nimmer "the First Amendment privilege, when appropriate, may be invoked despite the fact that the marketability of the copied work is thereby impaired." Nimmer, 17 U.C.L.A. L. Rev. at 1201. However, such an "impairment" could very well preclude a finding of fair use. Similarly, the First Amendment would require a dismissal where the portions of the copyrighted

(footnote continued on next page)

As in the case of libel (*New York Times* v. *Sullivan*, 376 U.S. 254 [1964]) and invasion of privacy (*Time, Inc.* v. *Hill*, 385 U.S. 374 [1967]), the possible "chilling effect" on the First Amendment freedom of expression requires that authors be allowed to express their opinions on matters of great public interest without fear that a copyright holder will attempt to suppress these views if they are contrary to his own. See *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). (The defense of this action has already caused petitioners well over $100,000 in time and money [Affidavit of George Berger in opposition to respondents' motion to transfer the appeal, ¶8].) On certiorari, this Court should determine the parameters beyond which the rights of the copyright holder will not be allowed to encroach upon the First Amendment rights of the author and upon the right of the public to be fully informed.

If, as Judge Gagliardi ruled, that balance should be achieved through a liberal application of the fair use defense, it is clear, that applying the same type of scrutiny on a motion for summary judgment now required in libel and privacy cases, there was no triable issue of fact to prevent the entry of summary judgment. If this Court were to carve out a new area of immunity for public interest writing (cf. *Griswold* v. *Connecticut*, 381 U.S. 479 [1965]), then, *a fortiori*, the judgment of the Circuit Court

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work utilized would exceed the permissible limits of the fair use defense, as would appear from the facts in *Time, Inc.* v. *Bernard Geis Associates, supra.* Despite its citation of the *Geis* case with approval (A21), it is clear that the reasoning and rationale of the Court of Appeals in the instant case was irreconcilable with that of Judge Wyatt in that case. Both the quantity and certainly the quality of the usage of the copyright material there, far exceeded that of the instant case.

must be reversed. However, regardless of where that line is drawn, under the facts of this case the First Amendment requires that the decision of the Court of Appeals be reversed. This is particularly true since even under traditional concepts of fair use, that decision is, we submit, incorrect.

The Defense of Fair Use Was Established as a Matter of Law

In determining the applicability of the defense of fair use, the courts have generally focused on the following factors: (1) the amount and substantiality of the copying; (2) the purpose and character of the use; and (3) whether the copying reduces the demand for the copyrighted material. See, e.g., *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Marvin Worth Productions* v. *Superior Films Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970); cf. 17 U.S.C. §107 (1976). As the analysis which follows indicates, when measured by these criteria, there can be no doubt that petitioners' very limited utilization of excerpts of letters fell squarely within the defense of fair use as a matter of law.

The first quoted excerpt from any such letter appears at page 393 of *The Implosion Conspiracy*, after the reader has finished more than eighty percent of the book. Furthermore, the quoted excerpts from *Death House Letters in toto* comprised approximately only .0085 of *The Implosion Conspiracy* and .024 of the *Death House Letters.* No

trial can increase these percentages.* As Judge Gagliardi found:

> "[T]he limited use of the letters in the latter sections is not, in this court's view, quantitatively or qualitatively substantial in the context of the entire work. Nor is the copied material qualitatively or quantitatively substantial in the context of the copyrighted work. Undoubtedly, the qualitative impact of copyrighted passages is a matter that to some extent turns on individual subjective judgment. Nevertheless, the undisputed facts in the record in this case are so overwhelming that this court finds that a reasonable jury could not reach the conclusion that the copying here is not entitled to fair use protection." (B28)**

In view of the many cases granting summary judgment on the grounds of fair use where the material copied was far more substantial from both a quantative and qualitative standpoint, we submit that this finding by Judge Gagliardi, was eminently correct. *See, e.g., Time, Inc.* v. *Bernard Geis Associates,* 293 F. Supp. 130 (S.D.N.Y. 1968); *Broadway Music Corp.* v. *F. R. Publishing Corp.,* 31 F. Supp.

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* Actually, a trial will most certainly decrease those percentages. First, the above numbers credit respondents with 111 words taken in turn from Shaw's "St. Joan," as to which they clearly have no claim (643a). Second, as appears from the record below, at least seven of the letters in issue were put in the public domain by their prior publication in the Daily Worker and National Guardian, without notice of copyright. See exhibits 2-8, affidavit of George Berger in opposition to motion for preliminary injunction (Document 15 in Record on Appeal).

** As above indicated, Judge Gagliardi also found this to be true as the trier of the facts, a finding which was not disturbed by the Court of Appeals (B30, A21).

817 (S.D.N.Y. 1940); *Karll* v. *Curtis Publishing Co.,* 39 F. Supp. 836 (E.D. Wis. 1941).*

Significantly the Court of Appeals did not disagree with Judge Gagliardi's finding regarding the insubstantiality of the copying.**

With regard to the purpose and character of the use, another of the tests of fair use, Judge Gagliardi found as follows:

> "Rather than being used to exploit individual feelings or expressions of plaintiffs' parents, the excerpts from the letters, like the trial transcript and other source materials, are used to relate certain facts relative to the whole event. *These letters in themselves are part of the historical record".* (B28-29) (emphasis supplied)†

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* In *Time, Inc.,* the copyrighted Zapruder film was the *basis* of the author's theory regarding the assassination of President Kennedy and consequently of much greater significance to his book than the Rosenberg letters are to *The Implosion Conspiracy.* In both the *Broadway Music* and *Karll* cases, the material copied was the entire chorus of songs in magazine articles. Accordingly, the lyrics copied amounted to many times more than the .024 of the copyrighted songs. In fact, in *Broadway Music,* 50% of the allegedly infringing work was devoted to copying the song.

** As is evident from its opinion, the Court of Appeals held that summary judgment was incorrect only because "the purpose for which the letters were included in the book and the effect of the use of the copyrighted letters on their future market were in dispute" (A18). As hereinafter demonstrated, however, there were no issues of fact and hence no "dispute" sufficient to defeat summary judgment even with respect to these two elements of the defense of fair use.

† Again, this finding by Judge Gagliardi, as the trier of the facts, was not disturbed by the Court of Appeals. Mr. Nizer's two other purposes for quoting excerpts are set forth on page 6, *supra.*

We submit that a reading of *The Implosion Conspiracy* can lead to no other conclusion.*

Finally, there can be no doubt that the use of the letters did not reduce the demand for respondents' book, assuming that there was a demand in 1973 when petitioners' book was published. Although both *Death House Letters* and *The Implosion Conspiracy* deal with Julius and Ethel Rosenberg, the resemblance ends there. *Death House Letters* is simply a compilation of letters written by the Rosenbergs while *The Implosion Conspiracy* is essentially a study of the trial itself, the post-conviction appeals, the petitions for executive clemency and the Rosenbergs' ultimate execution. Its treatment of the letters is fragmentary and severely truncated. In terms of lines of type, all of the excerpts could be reproduced on four pages of petitioners' 494 page book. No one seriously interested in reading the published correspondence of the Rosenbergs would consider purchasing *The Implosion Conspiracy.*

* In holding that there was an issue of fact sufficient to preclude summary judgment, the Court of Appeals observed that the sequence in which the letters were used, and whether they bore dates were "relevant to a determination of the purpose of their use" (A19-20).

We respectfully submit that the Court erred in crediting this contention at all. Matters of sequence, dating, elisions and the like are part of any author's license to present his materials in the manner which in his judgment is most effective to prove his thesis. If an author were to quote the entire text of the copyrighted work, the defense of fair use would probably not be available because the quantity of the material taken would exceed the permissible limits. Once however, he uses excerpts instead of full quotations, according to the reasoning of the Court of Appeals, summary judgment is never available because whether the excerpt is a fair representation of the copyrighted work itself becomes a question of fact. This simply cannot be the law. The "purpose and character" element of the fair use defense is properly determined from a reading of the defendant's work, *as he has chosen to present it.*

Moreover, as Judge Harold Tyler found, "the parties agree that *Death House Letters* has been out of publication for almost twenty years" (99a) and,

> "there is absolutely no suggestion, let alone proof, that the publication of *The Implosion Conspiracy* has lessened the value of the letters of Julius and Ethel Rosenberg. Practically speaking, the only realistic inferences are to the contrary, i.e., that the defendants' book probably has been the only significant event that might enhance their value."*

Furthermore, as Judge Gagliardi found:

> "Plaintiffs have yet to come forward with one iota of evidence indicating that *The Implosion Conspiracy* has in any way damaged the market for the Rosenberg letters. . . ." (B18)

In reversing, the Court of Appeals inaccurately stated that the lower "court concluded that plaintiffs might be able to prove damages at trial, but held this fact irrelevant" (A18). That is not the case. Judge Gagliardi simply assumed *arguendo* without concluding—that even if the value of the copyrighted work was diminished, the use of the letters was a fair one (B18). However, the Court of Appeals completely ignored the evidence which showed that such an assumption by Judge Gagliardi was an act of pure charity, without any basis in the record. Under these circumstances the statement by the Court of Appeals that "the market for republication or for sale of motion picture rights might be affected by the infringing work" (A17-18) was sheer speculation without a shred of

* The truth of this last statement was confirmed by plaintiffs' subsequent publication of *We Are Your Sons,* a book which contains several hundred letters. Plaintiffs asserted that *The Implosion Conspiracy* was their justification for writing that book (pp. xi-xii).

evidence in the record to support it. Respondents had never even intimated any such contention in their voluminous submission in opposition to the motion. Indeed, applying the Court of Appeals' reasoning, summary judgment based on the defense of fair use would *never* be appropriate even under the most compelling facts, since there is *always* a possibility, however remote, of republication or producing a motion picture based on the copyrighted work. Surely, if Rule 56 of the Federal Rules of Civil Procedure is to have any application to a copyright case, where the defense of fair use is otherwise established as a matter of law, something more than raw speculation must be shown to defeat the motion. Indeed, in *Time, Inc.* v. *Bernard Geis, Associates,* that possibility, which eventually became a reality ("The Trial of Lee Harvey Oswald") did not prevent the Court from granting summary judgment in favor of defendant.

Although the review sought herein is from a non-final judgment, the record is more than sufficient to preserve and present the issues raised by this petition, which if decided in favor of petitioners, would be dispositive of this action. See, e.g., *United Housing Foundation* v. *Forman,* 419 U.S. 1120 and 421 U.S. 837 (1975). The Courts and counsel would thereby be saved countless months of further depositions, motions, trial and appeals, not to mention thousands of dollars of additional expense. Further, because this case raises questions of First Amendment rights, the very pendency of this action has a "chilling effect" on the rights of petitioners and others to freedom of expression. See *Dombrowski* v. *Pfister,* 380 U.S. 479, 487 (1965).

Conclusion

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 886—September Term, 1976.

(Argued May 19, 1977 Decided July 28, 1977.)

Docket No. 76-7434

MICHAEL MEEROPOL and ROBERT MEEROPOL,
Plaintiffs-Appellants,

v.

LOUIS NIZER, DOUBLEDAY & CO., INC. and
FAWCETT PUBLICATIONS, INC.,
Defendants-Appellees.

Before:

MOORE, SMITH and MULLIGAN,
Circuit Judges.

Appeal from dismissal on summary judgment in the United States District Court for the Southern District of New York, Harold R. Tyler, Jr. and Lee P. Gagliardi, *Judges,* of a complaint alleging infringement of statutory copyright, invasion of privacy and defamation, and infringement of common law copyright.

Affirmed in part, reversed in part, and remanded.

MARSHALL PERLIN, New York, N.Y. (Kristin Booth Glen, New York, N.Y., Samuel Gruber, Stam-

ford, Conn., and Max R. Millman, Philadelphia, Pa. of counsel), *for Appellants.*

ROBERT M. CALLAGY, New York, N.Y. (Satterlee & Stephens, New York, N.Y., James Rittinger, of counsel), *for Appellees Doubleday & Co., Inc. and Fawcett Publications, Inc.*

GEORGE BERGER, New York, N.Y. (Phillips, Nizer, Benjamin, Krim & Ballon, New York, N.Y., Martin Stein, of counsel), *for Appellee Louis Nizer.*

SMITH, *Circuit Judge*:

Michael and Robert Meeropol appeal from dismissal on summary judgment in the United States District Court for the Southern District of New York, Harold R. Tyler, Jr. and Lee P. Gagliardi, *Judges,* of a three-count complaint alleging infringement of statutory copyright (Count I), invasion of privacy and defamation (Count II), and infringement of common law copyright (Count III). Jurisdiction is based on 28 U.S.C. §§1338, 1331 and 1332

Appellants are the natural children of Julius and Ethel Rosenberg. Their parents were executed in June 1953 after conviction for conspiring to transmit information relating to the national defense to the Soviet Union. Appellees Louis Nizer ("Nizer"), Doubleday & Co., Inc. ("Doubleday") and Fawcett Publications, Inc. ("Fawcett") are the author and publishers respectively of an account of the events surrounding the Rosenberg trial entitled *The Implosion Conspiracy,* published in 1973. Plaintiffs-appellants alleged that Nizer incorporated in his book substantial

portions of copyrighted letters written by Ethel and Julius Rosenberg without authorization and that this use constituted infringement of their statutory and common-law copyright. Nizer's allegedly inaccurate, misleading and fictionalized account of the events surrounding the trial, it is claimed, constitutes defamation and invasion of privacy as to appellants.

In June 1973 appellants filed a complaint in the Southern District of New York seeking injunctive relief and damages for copyright infringement, defamation, and invasion of privacy from defendants Nizer and Doubleday. Judge Tyler held that the Meeropols had not established sufficient likelihood of success on the merits and denied the request for injunctive relief. At the same time he denied defendants' cross-motion to dismiss the complaint. *Meeropol* v. *Nizer,* 361 *F. Supp.* 1063 (S.D.N.Y. 1973). Judge Tyler's decision rested in part on the possible availability to defendants of the "fair use" defense which might require the subordination of copyright claims to the greater public interest in the dissemination of knowledge. He refused to dismiss the complaint in order to give plaintiffs an opportunity to establish the facts, especially since it is not altogether clear whether letters stand on the same footing as "historical facts" in relation to the "fair use" doctrine. 361 F. Supp. 1067, 1070.

Following discovery proceedings and pretrial motions, the appellees, defendants below in the Southern District action, moved in January 1974 for partial summary judgment on the defamation and privacy claims of Count II. This motion was granted July 31, 1974 by Judge Tyler. 381 F. Supp. 29 (S.D.N.Y. 1974). In the meantime the

Meeropols had commenced a similar action against Fawcett, publishers of a paperback edition of the Nizer book, in the District Court for the District of Connecticut. Fawcett moved to stay the Connecticut action and sought leave to intervene in the New York action. These motions were granted in an unreported opinion by Judge Tyler, affirmed by this Court October 12, 1974. *Meeropol* v. *Nizer,* 505 F.2d 232 (2d Cir. 1974).[1]

On January 30, 1975 defendants moved to dismiss the remaining copyright counts, I and III, of the complaint. This motion was granted by Judge Gagliardi to whom the case had been reassigned following Judge Tyler's resignation from the bench. The present appeal is from the final judgment entered July 23, 1976 dismissing all counts of the complaint against all of the defendants, based on Judge Tyler's grant of partial summary judgment dismissing Count II dated July 31, 1974 and on an opinion and order of Judge Gagliardi dated July 20, 1976 dismissing Counts I and III of the original complaint and all three counts of the supplemental complaint. *Meeropol* v. *Nizer,* 417 F. Supp. 1201 (2d Cir. 1977). We affirm the dismissal of Counts II and III, and reverse and remand for further proceedings on Count I.

The Defamation Claim

Plaintiffs sought one million dollars in damages for defamation and invasion of privacy in Count II of their

1. In affirming the district court order granting a stay and Fawcett's motion for leave to intervene, we conditioned affirmance on the preservation of plaintiffs-appellants' right to jury trial as to defendant Fawcett. 505 F.2d 238.

complaint. They alleged that the juxtaposition in Nizer's book of excerpts of the private letters of their parents with "false, fictitious and distorted" statements was designed to deceive the reader and impress the public with the authenticity of Nizer's account in order to embarrass, humiliate, and ridicule plaintiffs and their parents.

In dismissing the defamation count the court below applied the standards set forth in *Gertz* v. *Welch,* 418 U.S. 323 (1974), *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971), and *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). It held that because they were the sons of the Rosenbergs, Michael and Robert were "public figures" and that in order to recover plaintiffs would have to establish that defendants' book was published with reckless disregard for the truth. The court analyzed the passages in the book alleged to be libelous. It found that

> The record as a whole, thus, establishes that there was no knowledge of falsity (if indeed, there is a falsity), no serious doubt concerning the truth of any statement in the article [sic] and certainly no reckless disregard of whether statements in the book were false.
>
> To the extent that *The Implosion Conspiracy* contains minor fictionalization or approximations of conversations that may have taken place between plaintiffs and their parents, these cannot be considered defamatory. Such techniques do not rise to the constitutional level of a clear and convincing showing of reckless disregard. As in Miller v. News Syndicate [445 F.2d 356 (2d Cir. 1971)], any "deviations from or embellishments upon" the information obtained from the

> primary sources relied upon were minuscule and can be attributed to the leeway afforded an author who attempts to recount and popularize an historic event.

381 F. Supp. 35.

We have carefully reviewed the portions of *The Implosion Conspiracy* which appellants have cited as defamatory. We agree with the district court that no passages are defamatory on their face. Of 77 pages cited, only 29 passages refer to appellants. Most of these passages contain innocuous references to the Rosenberg children and their interaction with their parents. While some of the accounts are undoubtedly somewhat fictionalized and inaccurate, almost none would be viewed as defamatory by any reasonable reader. Appellants were asked to specify in what respect the passages were false in answer to interrogatories from appellees. Their answers consisted in general allegations that the account misrepresented historical facts and cast their parents and their supporters in an unfavorable light. Three charges of falsity relating specifically to appellants are however included in the answers to the interrogatories.

On page 400 of his book Nizer writes, "Bloch [the Rosenberg's attorney] had placed Michael, nine years old, and Robert, five years old, in a Bronx shelter home." Appellants counter that they were never placed in a shelter by their parents' attorney. In fact the children were, at one point, transferred to a foster home because their paternal grandparents were ill and unable to care for them.[2]

2. *We Are Your Sons,* Robert and Michael Meeropol, (1975), p. 126.

Nizer's account of the evening of the Rosenberg's execution contains the following account on page 483:

> On the evening of the execution, the kind woman with whom the children were staying sought to shield Michael from the shock. There was a baseball game between the New York Yankees and Detroit Tigers on television. She lured him into watching it. She had underestimated the overriding interest in the case. Suddenly, there was a fearful scream like those that ejected him from his nightmares. A bulletin had flashed across the screen: "President Eisenhower has turned down Ethel and Julius' final appeal. They must die tonight."
>
> She rushed into the room and found Michael curled up in a corner of the big leather chair in a fetal position, whimpering. With difficulty, she lifted him in her arms and carried him to bed, where she held him tenderly during the sleepless night.

This constitutes an untrue description according to appellants because "Plaintiff sat quietly with his hands folded looking down. Plaintiff did not cry."[3]

Passages at pages 23, 242 and 366-67 of Nizer's book refer to the neurotic behavior of Michael and Robert as children. The accuracy of these descriptions has been documented in appellants' own book and in other sources.[4] The allegations that Nizer distorted the trial record, deleted

3. Plaintiffs' answer to interrogatory #38, p. 9.

4. *We Are Your Sons, supra,* pp. 118, 120; *The Betrayers,* Jonathan Root, pp. 78, 80, 108, 229; *The Judgment of Julius and Ethel Rosenberg,* John Wexley, pp. 124, 130, 142 and 198; Appendix at 126-129.

relevant parts of letters by their parents which were quoted in the book, or cast their parents' actions in a false light are irrelevant to an action for defamation brought by Michael and Robert Meeropol.[5] The literary and historical worth and accuracy of Nizer's account are not in issue before us, however important they may be to appellants. We may consider only the claims of appellants themselves and the rules of law applicable to them.

We agree with the court below that the Rosenberg sons are public figures. "[A]n individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts" and "such persons assume special prominence in the resolution of public questions." *Gertz* v. *Welch, supra,* 418 U.S. 351. In the course of extensive public debate revolving about the Rosenberg trial appellants were cast into the limelight and became "public figures" under the *Gertz* standards.[6] Even if some of the statements quoted above from *The Implosion Conspiracy* were found to be defamatory, appellants, as public figures, could not prevail absent a showing of reckless disregard of the truth or malice. *New York Times* v. *Sullivan, supra.* The record here is devoid of either recklessness or malice and in the course of extensive discovery proceedings appellants failed to cite a single specific incidence in which Nizer had recklessly or maliciously disregarded the truth

5. Prosser, *Law of Torts* §111, at 745 (4th ed.).

6. The decision whether or not a plaintiff in a defamation suit is a public figure is one properly made by the court in the first instance. *Rosenblatt* v. *Baer,* 383 U.S. 75, 88 (1965); *Hotchner* v. *Castillo-Puche,* 404 F. Supp. 1041, 1045 (S.D.N.Y. 1975), *rev'd on other grounds,* 551 F.2d 910 (2d Cir. 1977), *petition for cert. filed,* 45 U.S.L.W. 3841 (June 20, 1977).

in statements pertaining directly to them. We find no error in the trial court's denial of motions for further discovery on the issue of malice. *The Implosion Conspiracy* is lacking in material obviously false as to appellants. In the absence of such material their defamation claim must fall.

The Privacy Claim

Judge Tyler held that the activities of the Rosenberg children portrayed in *The Implosion Conspiracy* were matters properly within the "orbit of public interest and scrutiny." For this reason he held that statements in the book, even if they constituted an invasion of privacy, were constitutionally protected. 381 F. Supp. 37. The same standards of constitutional protection apply to an invasion of privacy as to libel actions. It is immaterial to appellants' privacy claim whether Nizer's book is viewed as an historical or a fictional work. In either case the *New York Times* v. *Sullivan* test on reckless disregard of the truth is applicable since we are dealing with public figures. *Time, Inc.* v. *Hill,* 385 U.S. 374, 390 (1967); *Spahn* v. *Messner,* 286 N.Y.2d 832, 834 (1967).

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a

civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of the press. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U.S. 88, 102. "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges* v. *California,* 314 U.S. 252, 269. . . . "The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]." *Winters* v. *New York,* 333 U.S. 507, 510. Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, ". . . it must be protected if the freedoms of expression are to have the 'breathing space' that the 'need . . . to survive' . . ." *New York Times Co.* v. *Sullivan, supra,* at 271-272. As James Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.).

Time, Inc. v. *Hill,* 385 U.S. 388-89.

Invasion of privacy, absent extreme, physical invasion of privacy, relates to a purely statutory right in New York

and is governed by §§ 50-51 of the New York Civil Rights law,[7] the same statute which was before the Court in *Time, Inc.* v. *Hill, supra. Koussevitzky* v. *Allen, Towne & Heath, Inc.,* 68 N.Y.S.2d 779, 781, *aff'd* 272 App. Div. 759, 69 N.Y.S.2d 432 (1974). A prerequisite for recovery under § 51 is that plaintiff's "name, portrait, or picture" is used by defendant. *Notre Dame* v. *Twentieth Century Fox,* 22 App. Div. 2d 452, 256 N.Y.S.2d 301, 304, *aff'd* 15 N.Y.2d 940, 259 N.Y.S.2d 832 (1965). Unauthorized biographical works are not subject to suits under § 51 since they are viewed as legitimate dissemination of information on subjects of general interest. *Koussevitzky, supra,* 68 N.Y.S.2d 783-84; *Sidis* v. *F-R Pub. Corp.,* 113 F.2d 806, 809 (2d Cir.), *cert. denied,* 311 U.S. 711 (1940). *Sidis* involved a claim for invasion of privacy by a former child prodigy who had subsequently cloaked himself in obscurity. Although this court found that an account in the *New Yorker* about plaintiff was "merciless in its dissection of intimate details" of plaintiff's personal life, *id.* at 807, it rejected his claim under §§ 50 and 51 of the New York Civil Rights

7. Sections 50 and 51 of the New York Civil Rights Law, 8 McKinney's Consol. Laws of N.Y. (1976) provide in relevant part

§50. Right of Privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor.

§51. Action for injunction and for damages

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof. . . .

law. Judge Clark, writing for the court, said that "Regrettably or not the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day." *Id.* at 809.

All reference to appellants in *The Implosion Conspiracy* are to Michael and Robert Rosenberg, not to Michael and Robert Meeropol. After their parents' death, Robert and Michael were adopted by the Meeropol family and except among a few intimate friends, were known exclusively under the name of their adoptive parents. Their true identity was concealed even from most of their closest friends and associates until sometime after the Nizer book was published. Nothing contained in the Nizer book linked the Rosenbergs to the Meeropols. Thus, even if we assumed *arguendo* that Robert and Michael Meeropol were not "public figures" at the time this book was published, the book could not have defamed them or invaded their privacy since the book never referred to them by the Meeropol name or in any way linked the Rosenbergs to the Meeropols. It was appellants' disclosure of their true identity following publication of *The Implosion Conspiracy* which made the accounts in the book referable to Robert and Michael Meeropol. This disclosure cannot be attributed to appellees-defendants.

The material published in *The Implosion Conspiracy* is beyond the reach of §§ 50-51 of the New York Civil Rights law and appellants' privacy claim was properly dismissed.

Fair Use Defense

The court below held that "as a matter of law the use of [the] copyrighted material under the circumstances here is covered by the fair use doctrine, and thus summary judgment is appropriate as to all defendants." Furthermore, as to defendants Nizer and Doubleday the court found on the basis of the record and its examination of the *Death House Letters* and *The Implosion Conspiracy* that the use of the copyrighted Rosenberg letters in *The Implosion Conspiracy* constituted fair use as a matter of fact.

Fair use has been defined as:

> a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright.[8]

The doctrine offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry. *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, —— F.2d ——, slip op. 4191 (2d Cir., June 15, 1977). Its application has been termed among "the most troublesome in the whole law of copyright." 2 M. Nimmer *Copyright*, § 145 (1976), *quoting Dellar* v. *Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939). Justice Story in an early case addressing the fair use defense which involved alleged infringement of copyrighted letters of George Washington

8. *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), *quoting* Ball, *The Law of Copyright and Literary Property*, 260 (1944).

remarked that "Patents and copyrights approach nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be very subtle and refined, and sometimes, almost evanescent." *Folsom* v. *Marsh,* 9 F.Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901). It is thus not surprising that the application of the fair use doctrine to the facts of this case confronts us with difficult and complex issues.

The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria. *Tennessee Fabricating Co.* v. *Moultrie Mfg. Co.,* 421 F.2d 279 (5th Cir.), *cert. denied,* 398 U.S. 928 (1970), *citing John Schulman,* 53 Iowa L.Rev. 832 (1968) (other cites omitted). The Copyright Revision Act of October 19, 1976, P.L. 94-553, 90 Stat. 2451 (1976), which will take effect January 1, 1978, codifies the fair use doctrine in §107. Section 107 is intended to restate the existing judicial doctrine of fair use, not to change, narrow or enlarge it. Copyrights Act, H.R.Rep. No. 94-1476, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5680. The text of 17 U.S.C. § 107 is as follows:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The court below applied these criteria in order to determnie whether the fair use defense was available to defendants. It held that to succeed on a summary judgment motion defendants had to show that no genuine issues of fact "had to be tried." 417 F. Supp. 1206, 1208. It found that factual issues raised by plaintiffs were either not in dispute or were such that even if resolved in plaintiffs' favor they would not affect the fair use question. 417 F. Supp. 1208, 1210. We must disagree. We think fair use not established as a matter of law and that genuine issues of fact exist precluding the grant of summary judgment for defendants.

Relying on *Rosemont Enterprises, Inc.* v. *Random House, Inc.,* 366 F.2d 303 (2d Cir. 1966), the court held that the definition of an historical work for the purpose of the fair use doctrine is a very broad one, and that *The Implosion Conspiracy* fell within this definition. 417 F. Supp.

1209. *Rosemont* involved the use of copyrighted material about Howard Hughes published in *Look Magazine* in a subsequent biography of Hughes. The court there found that this use fell within the fair use doctrine. Biographers, it held, customarily refer to and utilize earlier works dealing with the subject of the biography and occasionally quote directly from their works. The fact that the Hughes biography was perhaps not a profound work did not deprive it of the fair use privilege as a book of historical interest. Whether or not an author also has a commercial motive in publishing the work was held irrelevant to the availability of the fair use defense. In *Rosemont,* however, only two direct quotations had been copied. *The Implosion Conspiracy* includes verbatim portions of 28 copyrighted letters. *Rosemont* involved the use of copyrighted statements concerning the actions of a biographical subject, not as here the use of verbatim letters written by the subject. In addition, it appears that the fair use defense was upheld in *Rosemont* at least in part because the court found that the plaintiff there was acting in bad faith seeking to prevent the publication of a legitimate biography of Howard Hughes.[9]

We agree that the mere fact that Nizer's book might be termed a popularized account of the Rosenberg trial lacking substantial scholarship and published for commercial gain, does not, standing alone, deprive Nizer or his publishers of the fair use defense. For a determination whether the fair use defense is applicable on the facts of this case,

9. Concurring opinion of Judges Lumbard and Hays, 366 F.2d at 311.

however, it is relevant whether or not the Rosenberg letters were used primarily for scholarly, historical reasons, or predominantly for commercial exploitation. The purpose and character of the use of the copyrighted material, the nature of the copyrighted work, and amount and substantiality of the work used, and its effect upon the potential market for the copyrighted material are factors which must be evaluated in concert. *Williams & Wilkins Co.* v. *United States,* 487 F.2d 1345, 1353 (Ct. Cl. 1973), *aff'd by an equally divided court,* 420 U.S. 376 (1975) (per curiam). If the effect on the market by an infringing work is minimal, for example, far greater use may be privileged than where the market value of the copyrighted material is substantially decreased. Similarly, where use is made of underlying historical facts such use will be entitled to complete freedom but it is otherwise if there is verbatim copying of original, copyrighted material. "The fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard." *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra,* 366 F.2d 310.

A key issue in fair use cases is whether the defendant's work tends to diminish or prejudice the potential sale of plaintiff's work. *Marvin Worth Productions* v. *Superior Films Corp.,* 319 F. Supp. 1269, 1274 (S.D.N.Y. 1970); 2 M. Nimmer *Copyright,* § 145. The fact that the Rosenberg letters have been out of print for 20 years does not necessarily mean that they have no future market which can be injured. 2 M. Nimmer, *supra at* 649. The market for republication or for sale of motion picture rights might be

affected by the infringing work. Here the court concluded that plaintiffs might be able to prove damages at trial but held this fact irrelevant. 417 F. Supp. 1210, 1215. The court also conceded that the qualitative impact of the copied material presented an issue as to which reasonable men might disagree even though the basic quantity of the infringement and the surrounding circumstances were undisputed. The court admitted that the ultimate resolution of these issues turned on the subjective judgment of the trier of fact. *Id.* at 1211. The court then proceeded to hold that the use of the letters in *The Implosion Conspiracy* was entitled to the fair use defense because it found the use of copyrighted letters by Nizer to be insubstantial. "The letters . . ." it held, "do not in any sense form a major part of defendants' work." *Id.* at 1213. We disagree.

It was error to hold that as a matter of law the fair use defense was available to defendants when the purpose for which the letters were included in the book and the effect of the use of the copyrighted letters on their future market were in dispute. The determination whether the use under these circumstances was substantial should have been made by the trier of fact in the light of all relevant facts. In holding that the use here was insubstantial, the court distinguished *Folsom* v. *Marsh, supra,* 9 F.Cas. 342, the only American case which has addressed the verbatim copying of copyrighted historical letters. Justice Story denied the fair use defense in *Folsom* because he found that George Washington's letters formed a substantial part of the allegedly infringing biography. He held that there could be no fair use of letters in an historical work "if the value of

the original is sensibly diminished or the labors of the original author are substantially appropriated. "[Letters] may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy." *Id.* at 348. Justice Story is quite explicit about the policy underlying copyright protection for personal letters.

> What descendant or representative of the deceased author would undertake to publish at his own risk and expense, any such papers; and what editor would be willing to employ his own learning and judgment, and researches, in illustrating such work, if the moment they were successful, and possessed the substantial patronage of the public, a rival bookmaker might republish them, either in the same, or in a cheaper form, and thus either share with him, or take from him the whole profits.

Id. at 347.[10]

Defendants-appellees reprinted verbatim portions of 28 copyrighted letters, a total of 1957 words.[11] Although these letters represented less than one percent of *The Implosion Conspiracy,* the letters were prominently featured in promotional material for the book.[12] The fact that the letters were quoted out of chronological order, many undated,

10. See also, *Zacchini* v. *Scripps Howard Broadcasting Co.,* —— U.S. ——, 45 U.S.L.W. 4954, 4957 (June 28, 1977).

11. In addition, defendants copied two letters, containing 1058 words, copyrighted in the British edition of the *Death House Letters,* 417 F. Supp. 1206, n. 3.

12. See Appendix at 255.

without indication of elisions or other editorial modifications is relevant to a determination of the purpose for their use and the necessity for verbatim quotations for the sake of historical accuracy.

The availability of the fair use defense depends on all the circumstances surrounding the use of copyrighted material. This court has repeatedly stressed

> that "on a motion for summary judgment the court cannot try issues of fact; . . . it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, . . . with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. . . ."

Frey Ready-Mixed Concrete v. *Pine Hill Concrete Mix Corp.*, —— F.2d ——, slip op. 3369, 3375 (2d Cir. May 6, 1977), *citing Heyman* v. *Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975).[13] See also *Time, Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968); *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). Summary judgment on the issue of fair use was granted in *Time, Inc.* v. *Bernard Geis* and in the *Berlin* case, but there were no

13. See *Gladstone* v. *Fireman's Fund Insurance Co.*, 536 F.2d 1403, 1406 (2d Cir. 1976); *United States* v. *Bosurgi*, 530 F.2d 1105, 1110 (2d Cir. 1976); *National Life Insurance Co.* v. *Solomon*, 529 F.2d 59, 60-61 (2d Cir. 1975) (per curiam); *Home Insurance Co.* v. *Aetna Casualty & Surety Co.*, 528 F.2d 1388, 1390 (2d Cir. 1976) (per curiam); *Jaroslawicz* v. *Seedman*, 528 F.2d 727, 731 (2d Cir. 1975); *Judge* v. *City of Buffalo*, 524 F.2d 1321, 1322-23 (2d Cir. 1975).

relevant facts in dispute in either case. In *Berlin* it was clear that the infringing parody had neither the effect nor the intent of fulfilling the demand for the original work, and that no greater amount had been appropriated than necessary. In *Time, Inc.* v. *Bernard Geis* it was likewise undisputed that there was little or no injury to the copyright owner, and the court found that the infringing book was not bought because it contained a copyrighted photograph of the Kennedy assassination at issue in that case. 293 F.2d 146. In the case before us it has been conceded that plaintiffs might have incurred damages, and there is a dispute between the parties as to the purpose of and necessity for including verbatim letters in the book. For the sole purpose of the summary judgment motion all parties conceded that appellants held a valid copyright for the *Death House Letters*. This issue, as well as the fair use question, remains in dispute however.

Appellants are entitled to an opportunity to introduce evidence on the issues of the purpose of the use and of damages. Whether or not there has been substantial use which would deprive appellees of the fair use defense is a decision which must be made by the trier of fact that all the evidence has been introduced. We hold that it was error to uphold the fair use defense as a matter of law as to all defendants. As to Nizer and Doubleday it also was error to uphold the defense in the alternative on factual findings, in the absence of evidence on the question of damages. We therefore reverse the grant of summary judgment as to all defendants and remand so that appellants can be given

the opportunity to introduce evidence on all aspects of the fair use defense.[14]

The court did not address itself to the common law copyright count which was dismissed together with the statutory claim. Since it has been conceded that all material copied by appellees had been previously published, we affirm the dismissal of Count III.

Affirmed in part, reversed in part, and remanded for further proceedings in the light of this opinion.

14. The purpose for which the letters were included in the book, whether the book is bought because it contains the Rosenberg letters, the necessity for verbatim copying of the letters, and the effect of the use of the copyrighted letters on their future market are among the relevant factors which may be considered before there can be a decision as to the availability of the fair use defense to appellees.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT,

S. D. New York.

July 20, 1976.

No. 73 Civ. 2720.

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs,

v.

LOUIS NIZER *et al.*,

Defendants.

OPINION

GAGLIARDI, District Judge

This is a copyright infringement and invasion of privacy suit by Robert and Michael Meeropol against Louis Nizer ("Nizer"), author of the book *The Implosion Conspiracy,* Doubleday & Company, Inc. ("Doubleday"), the book's hardcover publisher, and Fawcett Publications, Inc. ("Fawcett"), the paperback publisher. The complaint alleges that *The Implosion Conspiracy,* which is about the espionage trial and conviction of Julius and Ethel Rosenberg, the

plaintiffs' natural parents, invades the plaintiffs' privacy and infringes on common law and statutory copyrights they hold on letters their parents wrote while in jail awaiting execution.

Three opinions have already been rendered in this case by former Judge Harold R. Tyler, Jr.: the first denied a preliminary injunction on the copyright claim on the ground that the plaintiffs had not shown a substantial likelihood of success, 361 F.Supp. 1063 (S.D.N.Y.1973);[1] the second, which was subsequently affirmed by the Court of Appeals, stayed a similar action brought by plaintiffs in Connecticut against Fawcett on condition that Fawcett intervene in this action, 73 Civ. 2720 (April 3, 1974) (unreported) *aff'd* 505 F.2d 232 (2d Cir. 1974); the third dismissed on the merits without leave to replead plaintiffs' invasion of privacy and defamation claim. 381 F.Supp. 29 (S.D.N.Y.1974) Plaintiffs have served a supplemental complaint including the same invasion of privacy claim in slightly different language. Defendants now move for summary judgment dismissing plaintiffs' complaint in its entirety.

While complete familiarity with all Judge Tyler's opinions is necessary for a full understanding of the issues here involved, the following extracts from the first opinion set forth the basic facts:

> Plaintiffs are the natural children of Julius and Ethel Rosenberg, who were executed in June, 1953 after their trial for treason in this court. Their complaint, filed on or about the same day as the present

1. An appeal was apparently taken from the denial of the preliminary injunction, but was later withdrawn. *See* 505 F.2d 232, 237 (2d Cir. 1974).

motion, sets out three separate claims: (1) for statutory copyright infringement pursuant to 17 U.S.C. § 101, with a prayer for permanent injunctive relief; (2) for damages of $1,000,000 for malicious defamation and invasion of plaintiffs' privacy through the publication of *The Implosion Conspiracy;* and (3) for money damages of $1,000,000 for common law infringement of and for injury to plaintiffs' property rights in unpublished and uncopyrighted works of their parents. Alleging diversity of citizenship, plaintiffs assert that this court has jurisdiction of the second and third claims pursuant to the provisions of 28 U.S.C. § 1331 . . . In essence, it is charged that Nizer in his book quoted all or portions of some 29 letters of Ethel and Julius Rosenberg, which appeared in the book Death House Letters of Ethel and Julius Rosenberg, copyrighted in the United States in 1953 by the Jero Publishing Company, Inc. ("Jero").[2]

• • •

Nizer and Doubleday contend, *inter alia,* that the challenged quotations constitute fair use of the material, that a significant part of the allegedly infringed material, if not all of it, is already in the public domain, that the plaintiffs are not the true copyright owners as asserted, and that they are barred by laches from bringing this action.

• • •

2. The parties now agree that only 28 letters are covered by plaintiffs' statutory copyright effective in the United States. Two additional letters were copyrighted in the English edition.

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The Implosion Conspiracy has enjoyed considerable popular success since its publication in February [1973]. In essence, it purports to be a factual but readable account of the trial and post-conviction legal proceedings in the celebrated *Rosenberg* case. A subordinate but nevertheless important theme of the author, as I understand his work, centers upon legal efforts of Emanuel Bloch and his total professional and emotional dedication to his clients, Julius and Ethel Rosenberg. Although the plaintiffs apparently claim otherwise, my reading of the book indicates that by and large it is a sympathetic and sensitive account of the Rosenbergs' personal, political and legal problems during the years of the trial and post-conviction appeals.

The parties agree that *Death House Letters* has been out of publication for almost twenty years.

• • •

. . . for the purposes of this motion, plaintiffs, in my view, have made a sufficient offer of proof that they are the equitable, if not legal, owners of the statutory claim. . . .

Nonetheless, upon evaluation of the entire record before the court, I conclude that the plaintiffs cannot meet their burden of establishing likelihood of success in this case. . . .

A major reason for concluding that the plaintiffs have fallen short of showing likelihood of success is the fair use defense raised by the defendants.

• • •

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. . . the continuing interest in and importance of the celebrated *Rosenberg* case probably entitled the defendants' new book to invocation of the fair use doctrine. . . .

Plainly, as defendants concede, *The Implosion Conspiracy* was designed and has been sold as a trade book for commercial gain . . . The book's commercial success, however, is no reason to conclude that it should be denied the benefits of the fair use doctrine. As I read *The Implosion Conspiracy,* the quotations were used with discretion and with demonstrable purpose to illustrate, from a historical and legal point of view, the post-conviction appeals and petitions for clemency which were filed by and for Mr. and Mrs. Rosenberg. The relevant portions of the book almost certainly will provide reasonably valuable source material for future historians, biographers and social scientists. Indeed, the conceded fact that the letters have been out of publication here and abroad for almost twenty years, in my view, tends to enhance the likelihood that defendants can prove fair use of the letters in question. Thus defendants are likely to prove that their book is a serious, full and readable account of what was a trial of great historical interest; that resort to quotations of certain of the Rosenberg's letters is important to any serious book on their trial; and that there is little possibility of injury to the plaintiffs. Indeed, defendants may be able to show that their book has enhanced the value of plaintiffs' copyright.

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In their papers opposing plaintiffs' motion, defendants have suggested and indeed urged that the record is sufficient for this court to dismiss the first claim on this ground. But "fair use" would seem to be a function of all of the circumstances, and plaintiffs should have the opportunity to rebut the presumption that arises from the nature of the materials and the circumstances described herein. It is not altogether clear that letters stand on the same footing as "historical facts", which are the product of research and in turn form the basis for subsequent works. See *Rosemont* [v. *Random House,* 366 F.2d 303 (2 Cir. 1966)], *supra.* And the relatively slight quantitative significance of the quotations perhaps overstates their qualitative impact. Defendant Nizer, moreover, is a lawyer; he knew about Death House Letters and its copyright, yet made only one somewhat ambiguous attempt to obtain permission to cite the letters in his book. Finally, although this is not stressed by the parties, it appears that defendant Doubleday published another book, *Invitation to an Inquest.* In the original version of that book, excerpts of certain of the Rosenberg letters appeared; but there is evidence that Doubleday would not permit such use unless written consent was obtained. Thus, it would seem that both defendants were well aware of the potential copyright infringement represented by quotations of the letters in *The Implosion Conspiracy.* Accordingly, defendants' motion to dismiss the first claim is denied without prejudice.

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> To summarize, then, the plaintiffs' motion for temporary injunctive relief is denied in all respects; further, the defendants' cross motion to dismiss the first stated claim in the complaint is denied without prejudice to renewal thereof upon an expanded record. 361 F.Supp. at 1065, 1067-68, 1070.

The defendants now renew their motion for dismissal of the complaint on the basis of an "expanded record."

I. Invasion of Privacy and Defamation Claim

Before discussing the other issues raised by the present motion it is well to dispose of the restated invasion of privacy and defamation claim. As this claim was previously dismissed without leave to replead by Judge Tyler, it is not properly before this court at this time. The supplemental complaint merely repleads and embellishes the allegations of the original complaint with respect to this claim in slightly more colorful language. Any new allegations in the supplemental complaint were previously considered and rejected by Judge Tyler at the time of the original dismissal of the claim. Count II of plaintiffs' supplemental complaint must thus again be dismissed on the ground of law of the case.

II. Copyright Claims

The defendants have expanded the record by providing (1) financial statements of Jero Publishing Co. and the Rosenberg Children's Trust Fund, showing no income from the Death House Letters after 1957 and (2) examples of 16 biographical and historical works containing excerpts

of letters used to illustrate and explain historical events. Plaintiffs have expanded the record with (1) affidavits of college history professors and authors of other books about the Rosenberg trial stating that The Implosion Conspiracy is of no historical value, and (2) Nizer's marked copies of those other works about the trial which allegedly indicate the extent of Nizer's reliance on those authors' research.

For the purposes of this motion, the defendants concede copying certain portions of letters covered by plaintiffs' copyright, but assert the right to do so under the "fair use" doctrine. In opposition, plaintiffs vigorously assert that summary judgment is inappropriate since the applicability of the fair use doctrine is a factual question which can only be determined at trial.

A. *The Fair Use Doctrine*

Defendants admit that *The Implosion Conspiracy* contained verbatim portions of some 28 letters—amounting to a total of 1957 words—which previously appeared in copyrighted editions of the *Death House Letters.*[3] They argue, however, that the amount of copying was relatively insubstantial in the context of the total work—approximately .85% of the 228,900 words in *The Implosion Conspiracy* and 2.4% of the 80,000 word *Death House Letters.* De-

3. The plaintiffs now agree that only 1,957 words are subject to the American copyright. They note, however, that there are two additional letters from which the plaintiffs have copied approximately 1,058 words that are copyrighted in the British edition of the *Death House Letters.* While plaintiffs concede that the copying of these letters may not have constituted a copyright infringement, they contend that the use of those letters, along with the copyrighted material serves to illustrate that the quality and quantity of the unlawful taking and use.

fendants assert that given the historical nature of *The Implosion Conspiracy* and the nature and use made of the letters in that work, any copying of copyrighted material is sufficiently limited to bring it within the protection of the fair use doctrine. Although the defendants' claim raises difficult questions in a difficult area of the law, on the basis of the record before it this court agrees that the doctrine of fair use should be applied to this case.

The concept of fair use is founded on "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner." Ball, Copyright and Literary Property 260 (1944); *Rosemont Enterprises, Inc.* v. *Random House, Inc.,* 366 F.2d 303 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009, 87 S.Ct. 714, 17 L.Ed.2d 546 (1957). The exact scope and limits of the doctrine are not clearly defined, with each case resting on its own specific facts—a situation which has led some commentators to call the doctrine "the most troublesome in the whole area of copyright." 1 Nimmer on Copyright § 145 at 644 (1972); *Dellar* v. *Samuel Goldwyn, Inc.,* 104 F.2d 661, 662 (2d Cir. 1939); See *Time, Inc.* v. *Bernard Geis Associates,* 293 F.Supp. 130, 145 (S.D.N.Y. 1968), citing, H.R. Rep. No. 83, 90th Cong., 1st Sess. 29, 30 (1967) ("since the doctrine in an equitable rule of reason, no generally applicable definition is possible"). Nevertheless, the vitality of the doctrine is now well established as courts in recent years have come to recognize that there are occasionally situations in which the copyright holder's interest in a maximum financial return must occasionally be

subordinated to the greater public interest in the development of art, science and industry. *Berlin* v. *E. C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir. 1964), *cert. denied*, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33; *Rosemont Enterprises* v. *Random House, Inc., supra* at 307. Although such situations cannot be easily defined in advance, in determining whether the use of copyrighted material constitutes a "fair use" the courts generally must consider the following four factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the copyright owner's potential market for and value of his work. *Williams and Wilkins Company* v. *United States*, 487 F.2d 1345, 1352, 203 Ct.Cl. 74 (1973), *aff'd, per curiam* 420 U.S. 376, 95 S.Ct. 1344, 43 L.Ed.2d 264 (1975); *Time, Inc.* v. *Bernard Geis Associates, supra* at 145. In evaluating these factors, an extremely important consideration is the public interest served by the use of the copied materials and by copying work itself. In *Rosemont Enterprises, Inc.* v. *Random House, supra,* the leading Second Circuit case on fair use, the Court thus stated:

> . . . whether the privilege may justifiably be applied to particular materials turns initially on the nature of those materials, *e. g.*, whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently the privilege has

> been applied to works in the fields of sicence, law, medicine, history and biography. 366 F.2d at 307.

In this case plaintiffs claim summary judgment should not be granted because substantial issues of fact exist as to (1) whether the defendants' book is a historical work entitled to the protection of the fair use doctrine, (2) the quantitative and qualitative significance of the copied material to the defendants' work, and (3) the effect of defendants' use of the copied materials on the market for the copyrighted work.

B. *Summary Judgment*

In their original papers, plaintiffs placed primary reliance on *Arnstein* v. *Porter*, 154 F.2d 464 (2d Cir. 1956), a copyright case in which Judge Frank found summary judgment to be inappropriate despite an almost overwhelming showing that there was absolutely no substance to the plaintiff's claim. In the period since this motion was submitted, the Second Circuit has come down with a series of decisions outlining the standards to be applied in motions for summary judgment. *Heyman* v. *Commerce and Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975); *Judge* v. *City of Buffalo*, 524 F.2d 1321 (2d Cir. 1975); *Jaroslawicz* v. *Seedman*, 528 F.2d 727 (2d Cir. 1975); *Zolar Publishing Company, Inc.* v. *Doubleday & Company, Inc.*, 529 F.2d 663 (2d Cir. 1975); *Home Insurance Co.* v. *Aetna Casualty and Surety Co.*, 528 F.2d 1388 (2d Cir. 1976); *United States* v. *Bosurgi*, 530 F.2d 1105 (2d Cir. 1976); *Chanofsky* v. *Chase Manhattan Corp.*, 530 F.2d 470 (2d Cir. 1976); *United States* v. *Matheson*, 532 F.2d 809 (2d Cir. 1976); *Williams* v. *Mc-*

Allister Brothers, Inc., 534 F.2d 19 (2d Cir. 1976). In *Heyman* v. *Commerce and Industry Insurance Co.*, the earliest of these recent cases, the Court questioned the continuing validity of *Arnstein* v. *Porter* stating:

> Although for a period of time this Circuit was reluctant to approve summary judgment in any but the most extraordinary circumstances, *see, e.g., Arnstein* v. *Porter*, 154 F.2d 464, 468 (2d Cir. 1946), that trend has long since been jettisoned in favor of an approach more in keeping with the spirit of Rule 56. 524 F.2d at 1319.

The Court, however, went on to say:

> But, the "fundamental maxim" remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. *American Manuf. Mutual Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967); *Cali* v. *Eastern Airlines, Inc.*, 442 F.2d 65, 71 (2d Cir. 1971). Moreover, when the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, *United States* v. *Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962), with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute . . . 524 F.2d at 1320.

These principles have been reaffirmed in other subsequent recent Second Circuit cases dealing with this issue. *Jaroslawicz* v. *Seedman*, *supra* at 731; *Zolar Publishing Co., Inc.* v. *Doubleday & Company, Inc.*, *supra* at 666; *Chanofsky* v. *Chase Manhattan Corp.*, *supra* at 472-73; *United States* v. *Bosurgi*, *supra* at 1110; *United States* v. *Matheson*, *supra* at 815; *Williams* v. *McAllister Brothers, Inc.*, *supra* at 20. At least two of these cases, however, have upheld a grant of summary judgment where it was clear that there was no genuine factual dispute relevant to the issue for decision. In *United States* v. *Matheson*, for example, where the issue was the citizenship for tax purposes of a wealthy decedent, the Court found that summary judgment was proper despite the contention that there was a factual question as to whether the decedent had renounced her American citizenship. The Court reviewed with approval the holding in *Heyman* and then stated:

> Only if no material factual issues exist may summary judgment be granted. However, it is equally true that summary judgment should not be denied where the only issues raised are frivolous and immaterial ones which would simply serve to provide an exercise in futility or a purposeless trial for the district court, particularly where no jury has been demanded. *See Beal* v. *Lindsay*, 468 F.2d 287, 292 (2d Cir. 1972); *Houghton Mifflin Co.* v. *Stackpole Sons, Inc.*, 113 F.2d 627, 628 (2d Cir.) *cert. denied* 308 U.S. 597, 60 S.Ct. 131, 84 L.Ed. 499 (1940).

This principle was also applied in a seaman's personal injury action in *Williams* v. *McAllister Brothers, Inc.*, *supra* at 20.

These recent cases indicate that to succeed on this motion defendants must show that there are no genuine issues of fact to be tried. However, the mere fact that a determination of the fair use question requires an examination of the specific facts of each case does not necessarily mean that in each case involving fair use there are factual issues *to be tried*. Undoubtedly, in many cases there are disputed factual questions crucial to the resolution of the fair use issue which can only be resolved at trial. In such cases, courts have properly denied summary judgment. *Higgins* v. *Baker,* 309 F.Supp. 635 (S.D.N.Y.1970); *Consumers Union of United States, Inc.* v. *Hobart Mfg. Co.,* 199 F.Supp. 860, 861 (S.D.N.Y.1961); *Cf. MacDonald* v. *DuMaurier,* 144 F.2d 696, 701 (2d Cir. 1944). On the other hand, in other cases involving the fair use doctrine where the facts were not seriously in dispute or the disputed facts would not affect the decision even if found adversely to the moving party, summary judgment has been granted. *Berlin* v. *E. C. Publications, Inc., supra; Gardner* v. *Nizer,* 391 F.Supp. 940 (S.D.N.Y.1975); *Time, Inc.* v. *Bernard Geis Associates, supra; Karll* v. *Curtis Publishing Co.,* 39 F.Supp. 836 (E.D.Wis.1941); *Broadway Music* v. *F–R Publishing Corporation,* 31 F.Supp. 817 (S.D.N.Y.1940). In such cases, a full trial by the district court would be a purposeless exercise in futility. *United States* v. *Matheson, supra; Williams* v. *McAllister Brothers, Inc., supra.*

Plaintiffs here argue that there are significant factual issues for trial, but a careful examination of the record before this court indicates a skillful attempt by plaintiffs to manufacture factual issues for trial where in reality none exist. The issues as to which plaintiffs claim there are

factual questions in this case are either not in dispute or are such that even if resolved in plaintiffs' favor the ultimate decision on the fair use question would not be affected.

Plaintiffs submit 14 affidavits from professors of history at leading universities and writers of other books about the Rosenberg trial stating in essence that *The Implosion Conspiracy* is riddled with distortions and inaccuracies and thus has no historical value. Through the testimony of these purported experts, plaintiffs claim that at trial they will be able to show that the defendants' book is not a historical work and thus is not entitled to the protection of the fair use doctrine. While plaintiffs' voluminous and vehement submission on this point gives the distinct impression that what is really desired is a trial of the accuracy and fairness of defendants' book and its implicit conclusion that the controversial Rosenberg trial was fair—an issue on which history alone must provide the final judgment—plaintiffs apparently do not fully understand the minimal standard which must be met in order for a work to be entitled to fair use protection. Even assuming plaintiffs' experts are correct that defendants' work is grossly inaccurate and distorted and lacking in even the minimum indicia of serious, scholarly historical research, it is not precluded from invoking the protection of the fair use doctrine. *Rosemont Enterprises, Inc.* v. *Random House, supra* indicates that the definition of a scientific or historical work for purposes of the fair use doctrine is a very broad one. In *Rosemont,* the Court of Appeals reversed the district court's holding that the fair use privilege applies only to scholarly works written for scholarly audiences and found that a commercial biog-

raphy of Howard Hughes was entitled to fair use protection. The Court there stated:

> . . . Indeed while the Hughes biography may not be a profound work, it may well provide valuable source material for future biographers (if any) of Hughes or for historians or social scientists. Contrary to the district court's view, the arts and sciences should be defined in their broadest terms . . . particularly in view of the development of the field of social sciences . . .
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> . . . Thus we conclude that whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use. 366 F.2d at 307.

In order to be a "historical" work for the purposes of invoking the fair use doctrine, defendants' book thus need not evidence (even a minimum) scholarly effort or be in the form prescribed by academic historians, as plaintiffs' experts apparently believe. Rather all that need be shown is that there be some serious attempt to describe a historical event which could be of some benefit to the public at large. Whether the work here meets this minimal legal standard is a question of law which must be determined by the court primarily on the basis of an examination of the work itself.

As previously noted, by Judge Tyler, *The Implosion Conspiracy* is primarily an analysis of the Rosenberg trial

and the post-conviction legal proceedings.[4] The author of the book—Louis Nizer—has a reputation as a leading trial lawyer. Even if, as plaintiffs contend, the book is filled with errors and completely devoid of independent research, this court believes that, as a matter of law, a purportedly serious work by one with Nizer's reputation and experience as a trial lawyer about a famous and controversial trial is of some public benefit and thus a historical work entitled to claim the protection of the fair use doctrine. The affidavits by the plaintiffs in no way raise a genuine issue of fact as to this question; rather, they indicate either a misunderstanding of the legal definition of a historical work for purposes of the fair use doctrine or that there may be disputed factual questions as to issues irrelevant to the determination of whether the defendants' book falls within that definition. The affidavits of many of plaintiffs' experts indicate that in fact even they would concede that defendants' book meets this minimal legal standard.[5]

Plaintiffs also claim that they will be able to prove at trial that defendants' work has reduced the potential market for future publications of the Rosenberg letters and

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4. 361 F.Supp. at 1065.

5. The affidavit of Professor Chomsky for example concedes that there are some comments on legal strategy of the parties and errors in cross examination in Nizer's book that might be of value. The letter of Professor Genovese states that the book has some value "as a document in itself." The letter of Mr. Goldstein, the producer of a television program about the Rosenberg trial, states that the book was read "with interest particularly inasmuch as Nizer is a close associate of Kaufman and Saypol." The affidavit of Professor Falk indicates that Nizer's book is a work of entertainment, which a library collecting books for scholars might buy "for the sake of completeness." The affidavit of Professor Williams indicates that the work would have value as primary source material for a scholar undertaking a biographical study of the author.

that the amount of material copied by the defendants is quantitatively and qualitatively substantial. While plaintiffs have yet to come forward with one iota of evidence indicating that *The Implosion Conspiracy* has in any way damaged the market for the Rosenberg letters,[6] it is possible that plaintiffs at trial would be able to prove such damage. For purposes of this motion, therefore it must be assumed that the defendants' book diminished the value of plaintiffs' copyrighted letters. This fact alone, however, is not in this court's view sufficient to preclude the defendants from claiming fair use. While the impairment of the commercial value of the copyrighted work is a factor to be considered, a copy may be sufficiently limited or otherwise privileged so as to be entitled to fair use protection.

Plaintiffs' claim that there are disputed factual issues as to whether the amount of copying in defendants' work is qualitatively and quantitatively substantial raises more difficult questions, as this claim goes to the heart of the fair use defense. Undoubtedly, whether a given amount of copied material is "substantial" is in some sense a factual question; it is not, however, necessarily an issue as to which there are factual questions to be tried. Accepting plaintiffs' claim as to the amount of material copied as true, as must be done on the present motion, what is in dispute is not the extent of copying but rather the legal conclusion to be drawn from the admitted amount of copying. With both works before the court and the amount

6. In fact, as Judge Tyler pointed out, if anything the record before this court indicates that the publication of *The Implosion Conspiracy* may have enhanced the value of plaintiffs' copyright on their parents' letters.

of copying undisputed, the question arises whether under the circumstances here there is any evidence that could be presented at trial which might ultimately affect the determination as to the qualitative or quantative importance of the copying.

Plaintiffs argue that this determination cannot be made solely from a reading of the two works. In papers filed at the court's request after supplemental argument, plaintiffs claim they will adduce at trial evidence extrinsic to the infringing and copyrighted works showing the importance of the copyrighted materials. However, most of the evidence which plaintiffs say they will introduce at trial relates to issues that for purposes of this motion are either not in dispute or not relevant to the fair use question. Recognition of the literary quality of the Rosenberg letters, for example, is not really disputed; as noted above in this case the historical accuracy of defendants' book or the amount of independent research that went into its preparation is not relevant. The other evidence which plaintiffs indicate they would introduce at trial even if unchallenged would not in this court's view affect the decision on the fair use question. The fact that the defendants may have used copied materials in the promotion of their work does not in itself prove that the copied materials are important to the work itself. Similarly, the alleged standard rule in the publishing industry in the United States that use of more than 300 words of a copyrighted work does not qualify as a fair use, even if such a rule exists, is not dispositive of the fair use question. Fair use is a legal question to be determined by the court not by alleged industry practice.

Plaintiffs also imply that they can present expert testimony presumably by literary authorities that would establish the quantitative and qualitative importance of the letters to the copyrighted and infringing works. Under Rule 702 of the Federal Rules of Evidence such expert testimony is permissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." The admission or exclusion of such testimony is a matter within the sound discretion of the trial court. *Salem* v. *United States Lines, Co.*, 370 U.S. 31, 35, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962); *Capri Jewelry Incorporated and Tancer & Two, Inc.* v. *Hattie Carnegie Jewelry Enterprises, Ltd. and James*, 539 F.2d 846, 849 (2d Cir. 1976); *Keystone Plastics, Inc.* v. *C&P Plastics, Inc.*, 506 F.2d 960, 966 (5th Cir. 1975); *see also Butkowski* v. *General Motors Corp.*, 497 F.2d 1158, 1159 (2d Cir. 1974); *Stevenson* v. *United States*, 378 F.2d 354 (2d Cir. 1967).

Although there may be fair use cases in which, because of the technical nature of the materials or other factors, such testimony is useful, this court does not believe that expert testimony on the qualitative impact of the Rosenberg letters in *The Implosion Conspiracy* would assist the trier of fact in determining the fair use question, and therefore it would not admit such testimony at trial. The work to be evaluated in this case dealt with a famous and controversial trial held in this district approximately 25 years ago. This court, or a jury, is fully competent to understand the subject matter of the work and to evaluate the qualitative importance of certain materials to the presentation of that subject. In a case like this the importance of the copied materials must be determined primarily by

an examination of the copyrighted and infringing works themselves. There is thus no factual question to be tried with respect to this issue.

That there is no question *to be tried* as to whether the amount of copying is qualitatively or quantitatively substantial does not, however, mean that there is no factual issue to be resolved as to this issue. Certainly, the qualitative impact of the copied material—i. e., its importance to the work—may present an issue as to which reasonable men can disagree, even though the basic quantity of the infringement and all the other surrounding circumstances are undisputed.[7] Under these circumstances, the ultimate resolution of the issue must turn on the subjective judgment of the trier of fact, and thus the standards to be applied on a motion for summary judgment may well be more stringent in a case in which the issue is to be submitted to a jury than in one in which a jury has been waived. As discussed in more detail below, in this case there is the somewhat anomalous situation that the plaintiffs have waived a trial by jury as to the defendants Nizer and Doubleday, but not as to the defendant Fawcett. The standard to be applied to the defendant Fawcett's motion for summary judgment thus may be different from that to be applied to Nizer and Doubleday's motions, even though each defendant may be entitled to summary judgment.

7. In the case of a design infringement, for example, the sole issue may be whether one pattern is sufficiently similar to another one. With a copy of both designs before the court, the question of their similarity is a factual one as to which two different arbiters of fact could draw different conclusions. It is not, however, necessarily a factual issue *for trial*.

C. *Application of the Fair Use Doctrine to These Letters*

Turning finally to the substantive question of whether in the circumstances of this case the use of plaintiffs' copyrighted letters in defendants' book is a fair use, this court must first determine the extent of copyright protection available to letters written by historical figures about public events. On the motion before him, Judge Tyler expressed uncertainty as to whether letters stand on the same footing as "historical facts" which are the product of research and in turn form the basis for subsequent works. 361 F.Supp. at 1070. Defendants submit examples of 16 different biographical and historical works in which excerpts from letters by historical figures are used to document, support and substantiate the authors' theories and conclusions about historical events, but apparently in none of these works were the excerpted letters subject to the copyright of someone who objected to their use.

Here the plaintiffs contend that the copyrighted letters constitute their parents' individual intellectual product and that the letters have high literary value which the defendants should not be permitted to appropriate in violation of their copyright. The problem is that the Rosenbergs' letters are also part of the historical record of events relating to the trial. Only in these letters do the Rosenbergs so fully set forth their thoughts and feelings about the events of which they were a significant part. Those thoughts and feelings are historical facts relating to the trial which may be directly relevant to a history of the events surrounding it.

It is not sufficient, as plaintiffs suggest, for the defendants who wished to describe the Rosenbergs' thoughts and feelings to resort to "the obvious device of not quoting them directly." To do so would have prevented them from fully and accurately conveying the Rosenbergs' own expression, which in this situation may be essential to an accurate rendition of the relevant thoughts themselves.[8]

Furthermore, the Rosenbergs' expression itself may be a relevant part of the history relating to the case. The Rosenbergs' rights in their own expression thus must be balanced against the public interest of historians and others in freely disseminating information about them and their reactions to the trial.

While famous individuals have long been considered to have rights with respect to the publication of their letters, *Baker* v. *Libbie,* 210 Mass. 599, 606, 97 N.E.2d 109, 112 (1912); *Philip* v. *Pennell,* 2 Ch. 577, 590 (1907). Note, *Personal Letters: In need of a Law of their Own,* 44 Iowa L.Rev. 705 (1959); *cf. Estate of Hemingway* v. *Random House, Inc.,* 53 Misc.2d 642, 279 N.Y.S.2d 51, 58 (Sup.Ct. 1967) *aff'd mem.* 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), *aff'd* 23 N.Y.2d 341, 296 N.Y.S.2d 771, 777, 244 N.E.2d 250 (1968), the question of whether limited parts of those letters can be copied verbatim in a historical work dealing with an event in which the writer was a major participant has rarely arisen. *Folsom* v. *Marsh,* 9 Fed.Cas. 342, Fed.Cas. No. 4,901 (1841) appears to be the only American case which discusses this issue directly.

8. This problem is discussed in Nimmer on Copyright § 9.232 at 28.21-28, 32 where the earlier decision by Judge Tyler is described as "a difficult border-line case testing the principle. . . ." §9 at 28.30 n. 208b 1975 Supp.).

There Justice Story outlined the then recently developing doctrine of fair use. In that case it was held that copyrighted letters of George Washington could not be republished in their entirety in a work on Washington's life where 255 pages of the 866 page infringing work consisted of copyrighted material. Justice Story therefore clearly found that the letters of a historical figure are at least to some extent entitled to copyright protection—even where the infringement is in a historical work. He also specifically rejected the defendant's claim that the limited use of the letters as part of a historical work constituted fair use—finding that "if the value of the original is sensibly diminished or the labors of the original author are substantially appropriated" there could be no fair use. It should be noted, however, that *Folsom* v. *Marsh,* involved a situation in which the copyrighted letters were a very substantial portion of the infringing work. Justice Story at the end of his opinion stated:

> It is not a case where abbreviated or select passages are taken from particular letters; but the entire letters are taken and those of most value to the public. . . . If it had been the case of a fair and bona fide abridgement of the work of plaintiffs, it might have been admitted of a very different consideration.

By contrast, the use of copyrighted letters by defendants here is much more limited. The copyrighted letters appear in the latter part of defendants' book in passages describing the experiences of the Rosenbergs while awaiting execution—particularly their reactions to the various

legal proceedings. As Judge Tyler noted, the quotations are used "with discretion and with demonstrable purpose to illustrate from a historical point of view, the post-conviction appeals and petitions for clemency which were filed for Mr. and Mrs. Rosenberg." 361 F.Supp. at 1068. The defendants' book seeks to describe the trial and its effects on the major participants. The letters are used by the defendants to illustrate and describe the impact of the trial on the Rosenbergs in the period after their conviction, as well as to convey their thoughts and feelings about the post-conviction legal proceedings. While not substantial in the context of the total work, the amount of copyrighted material used is more than insignificant. However, the letters do not in any sense form a major part of defendants' work.[9]

Under these circumstances, the character and purpose of the use and the nature of the defendants' work are the primary factors that must be considered in determining whether the Rosenbergs' property interests in the letters should be subordinated to the public interest in their dissemination by the defendants. This court believes that the relevant test for a fair use of historical letters should be (1) whether the taking is limited in scope, and (2) whether in the context of the entire work it appears that the purpose of using the letters is to illustrate historical facts with which the work deals rather than to capitalize on the unique intellectual product of the person who wrote them.

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9. In *Folsom* v. *Marsh,* the court stated:

> ". . . everyone must see, that the work of the defendants is mainly founded upon these letters, constituting more than one third of their work, and imparting to it its greatest, nay, its essential value. Without those letters, in its present form the work must fall to the ground." 9 Fed.Cas. at 349.

The application of this test to this case is complicated by the fact that a jury trial has been waived as to the defendants Nizer and Doubleday, but not as to Fawcett. Fawcett contends that since the defense of fair use is an equitable defense, plaintiffs are not entitled to a jury trial on the question of fair use in any event. In this case, however, the plaintiffs are clearly seeking money damages for losses they allegedly incurred as a result of defendants' purported infringement. This is a legal claim as to which they are entitled to a trial by jury. The fact that the defendants interpose a defense which they denominate as an "equitable defense" does not deprice the plaintiffs of their right to have a jury determine the merits of their claim if the case is otherwise appropriate for submission to a jury. *See Ross* v. *Bernhard,* 396 U.S. 531, 538-39, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970); *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469, 472-73, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).[10] Here, the Court of Appeals in its opinion affirming Judge Tyler's stay of the Connecticut action has already specifically found that plaintiffs have not waived their right to a jury trial with respect to Fawcett. 505 F.2d at 238. Therefore, if there is to be a trial in this case, with respect to Fawcett, plaintiffs are entitled to have all issues appropriate for determination by the trier of fact determined by a jury.

10. The cases cited by defendant in support of its contention that there is no such right to trial by jury in this case either involved claims as to which money damages were not sought as in *Cayman Music Ltd.* v. *Reichenberger,* 403 F.Supp. 794 (W.D.Wis. 1975) and *Berlin* v. *Club 100,* 12 F.R.D. 129 (D.Mass.1951), or like *Liberty Oil Company* v. *Condon National Bank, et al.,* 260 U.S. 235, 43 S.Ct. 118, 67 L.Ed. 232 (1922) are cases that were decided prior to the Supreme Court's decisions in *Beacon Theatres, Inc.* v. *Westover, supra, Dairy Queen, Inc.* v. *Wood, supra,* and *Ross* v. *Bernhard, supra* upholding the right to a trial by jury in cases in which there are both legal and equitable claims. The validity of these cases today is thus questionable. See, *e.g., Hyde Properties* v. *McCoy,* 507 F.2d 301, 305 (6th Cir. 1974); *Jefferson Standard Insurance Company* v. *Craven,* 365 F.Supp. 861, 863 (M.D.Pa.1973).

However, even where there is a right to trial by jury, the applicability of the fair use doctrine may not be a jury question. The fair use defense generally raises a mixed question of law and fact. In the first instance, the court must determine whether, as a matter of law, the use of copyrighted material in a specific case is entitled to fair use protection. Where the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could only reach one conclusion, it may render judgment as a matter of law in that party's favor without ever permitting the case to go to the jury. *See Brady* v. *Southern Railway Co.,* 320 U.S. 476, 479-80, 64 S.Ct. 232, 88 L.Ed. 239 (1943); *Fitzgibbons* v. *United States,* 522 F.2d 1353, 1354 (5th Cir. 1975); *Bertot* v. *School District No. 1, Albany County, Wyoming,* 522 F.2d 1171, 1175-76 (10th Cir. 1975); *Boeing Company* v. *Shipman,* 411 F.2d 365, 374-75 (5th Cir. 1969).

On the other hand there are many cases in which—either because the relevant facts are in dispute or because the question is sufficiently close as to turn of necessity on the subjective judgment of the specific trier of fact—it will be impossible for the court to find that there is fair use as a matter of law. In such cases the fair use question is necessarily a question of fact which must be decided by the trier of fact. It is in this latter kind of case that the right to a trial by jury becomes highly significant; for in such cases, a jury, properly instructed on the law, could very well render a valid verdict different from that which might be

rendered by the trial judge on the basis of the same evidence.

In this case, in accordance with the test of fair use set forth above, the scope of the use of copyrighted material by the defendants is relatively limited, and the purpose of the use of the letters does not appear to be to capitalize on the unique intellectual product of the authors. Here, whatever their literary quality, the letters are clearly used by the defendants to describe the feeelings and thoughts of two of the major participants in the Rosenberg trial. Unlike the material used in *Folsom* v. *Marsh,* it cannot be said that defendants' work derives a significant part of its value from the use of the copyrighted letters. Defendants' work deals largely with the trial and legal proceedings following the trial prior to the Rosenbergs' execution. While the impact of the trial and conviction on the relationship between Julius and Ethel Rosenberg is undoubtedly a minor theme in the book, the limited use of the letters in the latter sections is not, in this court's view, quantitatively or qualitatively substantial in the context of the entire work. Nor is the copied material qualitatively or quantitatively substantial in the context of the copyrighted work. Undoubtedly, the qualitative impact of copyrighted passages is a matter that to some extent turns on individual subjective judgment. Nevertheless, the undisputed facts in the record in this case are so overwhelming that this court finds that a reasonable jury could not reach the conclusion that the copying here is not entitled to fair use protection.

Rather than being used to exploit individual feelings or expressions of plaintiffs' parents, the excerpts from the

letters, like the trial transcript and other source materials, are used to relate certain facts relative to the whole event. These letters in themselves are part of the historical record. Nizer could reasonably have believed that the only way in which he could effectively present the facts relating to the Rosenbergs' reactions to the trial was to quote verbatim from limited portions of the Rosenberg letters. Nizer thus had to rely in small part on works covered by plaintiffs' copyright to present most effectively the facts relevant to his book. Given the public interest in the trial and the events surrounding it, plaintiffs' copyright should not give them a monopoly on the use or dissemination of facts relating to this historical event.[11] This court thus believes the fair use doctrine protects defendants' right to use plaintiffs' copyrighted letters to the limited extent

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11. There is also another related factor which should here be mentioned. Information about public figures and their reactions to the events of which they were a part is essential to the full and free discussion of those events by subsequent historians or anyone else who has an interest in them. To the degree that a public figure is the subject of historical research or attention, his family may have an interest in seeing him portrayed only in the most favorable light. In this kind of situation there is thus an inherent danger that members of the family of a historical figure may use a copyright on his writings as a means of suppressing unfavorable information or comment about him by later writers rather than for the legitimate protection of their proprietary interest in his intellectual product. Concern about this kind of misuse of the copyright laws was expressed by the concurring judges in *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra,* who noted:

> ". . . it has never been the purpose of the copyright laws to restrict the dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity. 366 F.2d at 311.

While not an important factor in the decision here, the potential for misuse of the copyright laws with respect to letters of historical figures is an additional reason for construing the fair use doctrine liberally in cases like this one.

here, even if that use results in a diminution of the value of the plaintiffs' copyright.[12]

For these reasons, this court holds that, as a matter of law, the use of this copyrighted material under the circumstances here is covered by the fair use doctrine, and thus summary judgment is appropriate as to all defendants. Furthermore, insofar as the defendants Nizer and Doubleday are concerned, as the trier of fact, this court finds on the basis of its examination of the two books and all other facts in the record that as a matter of fact the use of the copyrighted Rosenberg letters in *The Implosion Conspiracy* constitutes a fair use. Thus, even if this court were in error in holding that the copying here is entitled to fair use protection as a matter of law, it would grant summary judgment in favor of the defendants Nizer and Doubleday on the basis of the undisputed facts.

Defendants' motion for summary judgment dismissing the complaint is thus granted.

So Ordered.

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12. This court does not believe that under the circumstances here defendants' knowledge of the potential copyright infringement affects their right to claim fair use with respect to the copying of the copyrighted material. If, as has been here determined, defendants' use of the published material was legally permissible under the doctrine of fair use, then there was no necessity for them to attempt to obtain permission from the holder of the copyright. Their knowledge that the plaintiffs might contest their claim of fair use should not affect the legal validity of that claim. In *Time, Inc.* v. *Bernard Geis Associates, supra* the defendants had actually attempted to obtain permission to use copyrighted material and it was specifically denied. Nevertheless, the court found the use to be a fair one citing the public interest in disseminating the copyrighted material. The copyright there was on frames from the Zapruder films of the Kennedy assasination—material which was clearly more substantial in the context of the infringing work than that taken here.

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of July, one thousand nine hundred and seventy-seven.

Present:

Hon. LEONARD P. MOORE
Hon. J. JOSEPH SMITH
Hon. WILLIAM H. MULLIGAN — Circuit Judges

76-7434

Michael Meeropol & Robert Meeropol,
Plaintiffs-Appellents,

v.

Louis Nizer, Doubleday & Company, Inc., and Fawcett Publications, Inc.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix C

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

By Arthur Heller
Deputy Clerk

APPENDIX D

Recall of Mandate

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Court House, in the City of New York on the 13th day of October, one thousand nine hundred and seventy-seven.

76-7434

Michael Meeropol & Robert Meeropol,
Plaintiffs-Appellents,

v.

Louis Nizer, Doubleday & Company, Inc., &
Fawcett Publications, Inc.,
Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellees dated September 23, 1977 to recall the mandate and to stay its reissuance pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

/s/ Leonard P. Moore
Leonard P. Moore

/s/ J. Joseph Smith
J. Joseph Smith

/s/ William H. Mulligan
William H. Mulligan

Circuit Judges

Supreme Court, U. S.
FILED
NOV 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-608

LOUIS NIZER, DOUBLEDAY & CO., INC.
and FAWCETT PUBLICATIONS, INC.,

Petitioners,

v.

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR MICHAEL MEEROPOL AND ROBERT MEEROPOL IN OPPOSITION

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IN THE

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LOUIS NIZER, DOUBLEDAY & CO. INC. and FAWCETT PUBLICATIONS, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MICHAEL MEEROPOL AND ROBERT MEEROPOL IN OPPOSITION

Opinions Below

The opinion of the District Court is reported at 417 F.Supp. 1201 (S.D.N.Y. 1976). The opinion of the Court of Appeals is reported at 560 F.2d 1061 (2d Cir. 1977).

Question Presented

Whether the Court of Appeals correctly found that the district court erred as a matter of law and as a matter of fact in granting the petitioners' motion for summary judgment, and correctly found that there were disputed

issues of fact bearing upon the issues and applicability of the defense of fair use requiring the remanding the matter to the district court for further proceedings and trial.

Statement of the Case

In June, 1973, respondents Michael and Robert Meeropol, sons of Ethel and Julius Rosenberg, instituted an action in the United States District Court for the Southern District of New York. Count I of the complaint seeks damages and injunctive relief for statutory copyright infringement under 17 U.S.C. §101. The Meeropols are the owners of copyrighted letters written by their parents Rosenberg while incarcerated, which were first published in June 1953 under copyright in a book, DEATH HOUSE LETTERS OF ETHEL AND JULIUS ROSENBERG. The complaint alleges that petitioners Nizer, Doubleday and Fawcett infringed upon and unlawfully appropriated the Meeropols' copyrighted letters by incorporating in the petitioners' book, THE IMPLOSION CONSPIRACY, substantial verbatim portions of those letters without authorization. The Meeropols allege that the wrongfully appropriated letters were misused and distorted by the petitioners and were exploited by the petitioners as a means of seeking to authenticate, promote and sell their book. (A1-8, 18-29, 55-68)*

Petitioners' answers to the complaint, essentially identical, acknowledged the verbatim copying of the copyrighted letters, but asserted, *inter alia*, the defense of "fair use". (A32-33, 39-41, 47) No claim or defense of

* References to the appendix on appeal to the Second Circuit are prefaced with the letter "A" followed by the page number (e.g., A-1-28).

privilege under the First Amendment was pleaded by any of the petitioners to this count of the complaint.

As a result of stays issued by the district court from almost the very inception of the action, the Meeropols' depositions were only at their initial stages when the petitioners moved by summary judgment to dismiss the statutory copyright count on January 30, 1975. (A207-237)

The motion for summary judgment came before Judge Gagliardi in May 1975. The Meeropols submitted numerous affidavits in opposition, noting the multitude of disputed issues of fact which were raised which could only be resolved by a trial before a court and jury. (A250-506, 553-606)

The decision granting petitioners' motion for a summary judgment was rendered on July 20, 1976. (A651-683) Final judgment was entered on July 23, 1976 (A684), and respondents appealed.*

The Court of Appeals reversed the grant of summary judgment on the statutory copyright claim and remanded the matter for further proceedings and trial of all of the factual issues. The Court stated:

> "We think fair use not established as a matter of law, and that genuine issues of fact exist precluding the grant of summary judgment for defendants." (Pet. Appendix A15.)

The Copyrighted Letters

The Rosenbergs during the period of incarceration wrote numerous letters to each other, their children and attorneys

* Count II of the complaint for defamation and invasion of privacy were dismissed by the district court on motion for summary judgment, 381 F.Supp. 29 (S.D.N.Y. 1974) The dismissal was affirmed by the Court of Appeals and is not the subject of the present petition.

which were published under copyright in June of 1953 for the express purpose of using the proceeds to support their children, the respondents herein, during their minorities and for their education. (A2-7, 254) During the years 1953 to 1956 THE DEATH HOUSE LETTERS were published in the United States and in numerous countries throughout the world, the sale and distribution numbering in the hundreds of thousands. They were appreciated and esteemed for their content and their high literary value. (A255-259) The letters constituted the respondents' inheritance from their parents, which they preserved with the specific intent of republishing portions of them at such times as they deemed appropriate (Document 3, Record on Appeal).

All of the petitioners have acknowledged their awareness of the fact that the Rosenberg letters were copyrighted and that they were fully on notice of that fact prior to the infringement. Indeed, Doubleday, who had published a previous book on the Rosenberg case, INVITATION TO AN INQUEST, refused to permit the authors of that book to include respondents' letters until they had received full written authority from the copyright owners.* (A19-29, 64-67, 82-83, 558-559, 568-570)

The Infringing Work

The infringing work, THE IMPLOSION CONSPIRACY, had its genesis in a television script written by Nizer and thereafter converted into the book published by Doubleday and Fawcett. Notwithstanding the representations of the petitioners to the contrary, approximately 70% of the book

* While petitioners appropriated the copyrighted letters without authorization or consent from respondents, strangely the petitioners obtained the consent of the Bernard Shaw Estate for publishing a quote from ST. JOAN—but that quote was in a copyrighted letter of Ethel Rosenberg which the petitioners opted to infringe upon.

related to Nizer's semi-fictionalized, inaccurate version of the Rosenberg trial and post-trial legal proceedings. In the last 125 pages of the book one finds all of the copyrighted letters misleadingly interlaced with false and fictitious descriptions of dialogue and events involving the Meeropols and their parents. It is obvious that the petitioners appropriated the copyrighted letters and prominently featured them for commercial exploitation seeking to capitalize on the unique intellectual and literary product of the respondents' parents. This was made evident in the promotional material utilized by the petitioners in its advertising of the infringing work.*

The Opinion of the Court of Appeals

The Court of Appeals, after noting that the application of "fair use" was among "the most troublesome in the whole law of copyright" in a metaphysical area of the law, concluded that it "depends on an examination of the facts in each case", rather than "resort to arbitrary rules or fixed criteria".

* The dust jacket of the book states:

"... the love story of Ethel and Julius and expressed in love letters between them while in the death house." (A255)

In advertisements, and in the press, radio and television the letters are prominently referred to, and quoted by Nizer and others:

"... profound love between Ethel and Julius—as expressed in their death row correspondence..." (A255)

"Enormous drama ... the extraordinary passion of their letters to each other ..." (A256)

"They [Rosenbergs] expressed their longing by writing love letters. I quote generously from them in the book... eloquence ... lyrical passion would be worthy of a great poet. I will not quote more of their letters here. The book does." (A256)

"The love letters she wrote were published while she was in jail. They were moving documents. Somehow or other people who face death become very eloquent. (A255)

In reviewing the record below, the Court found that the district court erred in ignoring the genuine relevant issues of fact or in refusing to recognize that there were material issues of fact which could only be resolved by trial, and it was on these fact resolutions that the ultimate questions of law could be correctly decided.

Unlike *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), cert. den., 385 U.S. 1009 (1967), the Court of Appeals held the present case involves the verbatim copying of substantial portions of the copyrighted letters written by the subjects, the Rosenbergs.*

The Court of Appeals set forth some of the factual issues which would have to be resolved on the trial of the action, issues which *"must be evaluated in concert"* and which can not be resolved by summary judgment:

> Whether the Rosenberg letters were used for scholarly historical reasons, or predominantly for commercial exploitation;
>
> The purpose and character and quality of the use of the copyrighted material in the infringing work, as well as the nature of the copyrighted work;
>
> The necessity of the verbatim copying of the letters;
>
> The amount taken and substantiality of the use in the work involved, as well as its effect upon the potential market of the copyrighted material;
>
> Whether the petitioners' work tends to diminish or prejudice the potential sale of the copyrighted work;

* In addition to the verbatim copying of 28 copyrighted letters, the Court noted that the petitioners copied two additional letters containing 1,058 words published in the copyrighted British edition of THE DEATH HOUSE LETTERS.

> The market for republication or for sale of motion picture rights, and the affect of the infringement thereon.

The Court found, as even the district court had acknowledged, that the qualitative impact of the material copied and infringed upon was a subjective and factual issue which could only be resolved by the presentation of all the evidence at a trial; and that the district court had erred in finding as a matter of fact and law that the infringement and appropriation of the respondents' copyrighted letters was insubstantial.

The Court further quoted approvingly from *Folsom* v. *Marsh*, 9 F.Cas. 342 (C.C.D. Mass. 1841) (No. 4901), to the effect that the court has been explicit in affording copyright protection for personal letters of historical figures and that, further, the infringing of the same by including them as a distinct and integral part of another work would constitute a clear case of piracy; and the district court was in error in concluding as a matter of law on the basis of *Folsom* v. *Marsh* that the taking in this case was insubstantial.

The Court of Appeals cited the most recent decision of this Court bearing upon the need and the right to protect copyrighted property in the face of a First Amendment claim. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, —— U.S. ——, 97 S.Ct. 2849, 53 L.Ed. 2d 965 (1977) at pp. 2856, 2857.

The Court of Appeals found that "the letters were prominently featured in promotional material for the book" and that the letters were quoted out of context and altered, thus raising the serious factual issue of the claimed "necessity for the verbatim quotations for the sake of historical accuracy".

The Court held that the respondents were entitled to introduce evidence on the issues of the purpose of the use and the damages caused by the infringement, all as part of the ultimate determinations of fact and law which could only be made after a trial. In this regard the Court in a concluding footnote set forth in brief fashion some of the many issues of fact to be resolved upon the remand and trial:

> "14. The purpose for which the letters were included in the book, whether the book is bought because it contains the Rosenberg letters, the necessity for verbatim copying of the letters, and the effect of the use of the copyrighted letters on their future market *are among the relevant factors which may be considered* before there can be a decision as to the availability of the fair use defense to appellees." (emphasis supplied)

ARGUMENT

The sole question presented by the petitioners is whether the Court of Appeals correctly concluded, that the motion for summary judgment to dismiss the copyright statutory count raised material and relevant issues of fact which required a trial before a court and jury. The petitioners do not claim that the Court of Appeals misstated the law applicable to a defense of "fair use" in a copyright case. Petitioners argue that (pet. p.17) the Court of Appeals should have applied other undefined rules rather than resolve the question "by the mere application of the traditional defense of fair use".

Petitioners offer none of the grounds warranting granting certiorari as defined by Rule 19 of this Court. The decision of the Court of Appeals is not in conflict with the

decisions of other courts of appeals; it did not decide an important question of federal law which had not previously been resolved by this Court; nor was the decision of the Court of Appeals in conflict with the applicable decisions of this Court.

The application of any fair use defense requires resolution of a host of crucial underlying fact issues, and thus summary judgment can never be granted where there is a dispute of any material facts. It is only after trial and resolution of facts and judgment that meaningful appellate review should be had. Thus petitioners' present application for certiorari is totally premature and at best constitutes a request for an advisory opinion by this Court on speculative and disputed issues of fact.

The issue which the petitioners are seeking to pose before this Court is not of the specifically delimited kind subject to generalized interpretation and applicable in the absence of particular facts such as whether shares of stock in a cooperative state sponsored non-profit housing cooperative is a "security" under the provisions of the Securities Act of 1933. *See, United Housing Foundation* v. *Forman,* 419 U.S. 1120 and 421 U.S. 837 (1975).

The Court of Appeals Correctly Vacated the Order Granting Summary Judgment and Remanding the Matter for Trial.

The Court of Appeals clearly articulated the principal elements underlying the defense of fair use and clearly delineated some of the many issues of fact which had to be considered and resolved by trial in this case before there could be any ultimate decision and determination of the availability of the fair use defense to the petitioners.

The defense of fair use cannot be determined on the basis of mathematical formula or "arbitrary rules and fixed cri-

teria". Thus the petitioners' persistence in dividing the number of words stolen into the total number of words in the copyrighted property or the infringing work, does not meet or resolve the "difficult and complex issues" posed in this case. (Appendix A14, pet.) The Court of Appeals meticulously examined the legal and factual premises upon the which the district court rendered its decision. The Court of Appeals clearly analyzed and defined the errors found in the district court opinion and then set forth the guidelines and areas of proof which must be dealt with upon the trial of the action.

The petitioners have chosen to avoid and almost totally disregard the decision of the Court of Appeals and to misread or misstate it Such is the only explanation for the petitioners' claim that the Court of Appeals did not disagree with the district court regarding the substantiality of the infringement. (pet. 21) The Court of Appeals at length itemized the very specific factual issues necessary for a determination of whether there was a substantial use of the copyrighted material. The petitioners argue that the district court was correct in finding that no damage resulted from the unlawful appropriation of the respondents' property. But both the district court and the Court of Appeals found that the respondents might well be able to prove substantial damages, but the Court of Appeals held the district court erred in arrogating to itself that issue in the absence of a trial.

The petitioners ignore the Court of Appeals' holding and premise their present application, as if a trial had been held—the trial they seek by all means to avoid. Only then will they then be confronted with the reality of meeting their burden of proof in seeking to establish the defense of fair use.

Petitioners' First Amendment Argument Is Contrived, Lacking Substance and Merit.

The petitioners argue that this Court should grant certiorari on the vague "question of the relationship between the First Amendment and the Copyright Laws". Just what the particular question is, is never defined. Nor is it explained how such a "question" was dealt with or disposed of by the Court of Appeals. In effect the petitioners argue that an infringer who pirates copyrighted writings should be immune from liability or trial, if the infringing work touches upon a subject of topical or historical interest.

The petitioners in their answer to the copyright count, neither pleaded nor raised any First Amendment defense or privilege (A30-50). In their brief to the Court of Appeals, the petitioners argued that the First Amendment requires a "liberal application of the fair use defense". The argument so lacked merit as to not warrant any comment or response by the Court of Appeals in its opinion.

The petitioners now argue that applying the well-recognized principles of a fair use defense will prevent them from writing a book supportive of the Rosenberg trial and conviction or express their opposition to capital punishment. To clearly state the petitioners' position is its most effective refutation. Nizer and his associates are in effect contending that they have the right to take and use copyrighted Rosenberg letters and that this Court should, on petitioners' motion for summary judgment, "carve out a new area of immunity for public interest writing", (pet. p. 18) and on those grounds reverse the Court of Appeals.

The authorities cited by the petitioners afford them no support. In *Wainwright Sec.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), the Court conjectured

that in some appropriate case in the future the issue of reconciliation of copyrighted news reports, First Amendment rights and the Copyright Law, could raise some provocative questions, but, dealing with the case before it stated:

> "It is important to differentiate between the substance of the information contained in the report, i.e., the evidence itself, and 'the particular form or collocation of words in which the writer has communicated it' . . . What is protected is the manner of expression . . . the way he structures his material and marshals facts, his choice of words . . ." (pp. 95, 96)

In language particularly applicable to the petitioners, the Court differentiated between "a true scholar and a chiseler who infringes a work for personal profit". The Court then characterized the infringing defendant's conduct ". . . there is no other way to describe it, chiseling for personal profit." It applies with equal force here. The petitioners' attempt to invoke *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra,* in support of their position does not require extensive comment. The Court of Appeals addressed itself to that case and distinguished it from the present one. (Pet. Appendix A15-16)

Equally mistaken is petitioners' reliance on Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A.L.Rev. 1880 (1970). The excerpt cited by petitioners (at p. 1197, not p. 1185) applying to graphic works does not apply to the present case, the verbatim copying of writing, the "form of expression". The Nimmer article fully supports the respondents' position in the present litigation. And see also: 2 Nimmer, *The Law of Copyright,* at pp. 145, 646, 649. In *Time, Inc.* v. *Bernard Geis Associates,* 293 F.Supp. 130

(S.D.N.Y. 1968), it was the graphic work, not the form of verbal expression which was at issue.

Respondents are fully appreciative of the importance of the First Amendment, but petitioners' false claim that a trial of the copyright count will have a "chilling effect" which must be rejected.

Pages 7 Through 12 of the Petition Should Be Stricken as False, Scurrilous and Scandalous.

Petitioners falsely claim that the respondents instituted the present action, not on the merits and to seek relief, but to "overturn the conviction of their parents", to vilify the trial judge, to raise money for this political campaign; and further to suppress by means of the Copyright Laws books that conclude the Rosenbergs received a fair trial.

At the inception of this action, the respondents submitted an affidavit which categorically stated:

> "We understand the question of our parents' innocence is not to be litigated in this proceeding." (Document 3, Record on Appeal)

The false claims were also repeated in the Berger affidavit of October 9, 1974 (Document 85[a], Record on Appeal). On respondents' motion, that affidavit and its exhibits were stricken by order of Judge Tyler.

The same false claim was repeated in the October 5, 1976 affidavit of George Berger in the Court of Appeals. Michael Meeropol then replied by affidavit:

> "We totally and categorically reject the assertion of bad faith as the most base form of slander. Obviously this charge is a diversion . . . We initiated this action

because our personal property had been appropriated without permission and soiled and misused in Mr. Nizer's book, *The Implosion Consviracy.*"

And further,

"... Mr. Berger's statement is a lie as he well knows. At no time have my brother and I *ever* used the instant litigation to raise money for our political efforts. We have engaged in fund raising for this lawsuit—and there is nothing illegal or improper about that. However, the overwhelming portion of the expenses of the instant litigation have been borne by our own personal finances."

The same false issues were raised by petitioners in their brief (pp. 21-25), but the Court of Appeals, obviously, found no merit to the contention and completely ignored them.

Respondents have undertaken the present action to protect their inheritance, the letters of their parents, from misappropriation and misuse by the petitioners.* That is the action they brought; those are the issues they wish to press and litigate to a successful conclusion.

The petitioners' claim that the present action was instituted for the "ulterior motive" to suppress books hostile

* Petitioners refer to a portion of the district court opinion directed to the many affidavits submitted by respondents in opposition to the motion for summary judgment. They were tendered to refute petitioners' contention that the infringement should be sanctioned because the Nizer book was a scholarly work valuable to future historians and students. (See district court opinion of July 18, 1973, A107, 112-113; and petitioners' motion for summary judgment, A217-218).

to respondents' parents or supportive of the judgment of conviction is equally false and scurrilous.*

When the respondents learned of the petitioners' infringement of their parents' copyrighted letters, they immediately called upon the petitioners, by letters dated May 10, 1973 (A19-29) to delete the copyrighted letters from the book; to stop using the letters in the advertising and promotion of the book; and to stop falsely holding themselves out as the owners or possessors of the letters with authority to publish them. There were then only about 15,000 unsold copies of the book, and the paperback edition had yet to be issued. The petitioners were not proscribed from fully and completely expressing their views about the fairness of the Rosenberg trial, the verdict, and the sentences imposed and publish the book absent the copyrighted letters.

On December 7, 1973, four months prior to the publication of the paperback edition of THE IMPLOSION CONSPIRACY, the respondents wrote to Fawcett enclosing copies of the letters of May 10, 1973, telling them to delete and not publish the copyrighted letters. Fawcett never responded, published the book with the copyrighted letters and relied upon them in promoting the sale of the book. (A64-67, 82-83)

Petitioners' claim that the institution of the present action was part of a plan to vilify the trial judge and institute a congressional investigation of his conduct is likewise false, scurrilous and scandalous and refuted by the facts. At the time when this action commenced in June

* We need not burden this Court with the list of the many books supportive of the Rosenberg-Sobell trial, verdict and the sentences meted out. To mention a few, see: S. Andhil Feinberg, THE ROSENBERG CASE; J. Edgar Hoover, MASTERS OF DECEIT; Alan Moorehead, THE TRAITORS; Oliver Pilat, THE ATOM SPIES.

of 1973, the respondents were not even contemplating a FOIA action, nor were they aware of the contents of the FBI files and what they would disclose. They started this action in the Southern District of New York, within the Second Circuit where Judge Kaufman is the Chief Judge. As residents of Massachusetts respondents, had they knowledge of the contents of the FBI files as they bear upon the trial judge's conduct, they would have commenced the action elsewhere. The FOIA action was commenced in July 1975, and the relevant FBI files were not found until May or June 1976, a short time prior to Judge Gagliardi's decision dismissing the copyright count of the complaint.

The motion made by the respondents to transfer the appeal to another circuit or to designate circuit court judges from outside the second circuit to hear the appeal was a good, reasoned and well founded motion which the respondents were compelled to make in order to avoid the danger of bias and prejudice in the appeal then pending. The motion was denied, and an application was made to Circuit Justice Marshall, who denied the application on the ground that he had no authority to grant the relief sought.

In denying respondents' motion for a transfer, the panel hearing the motion opined that "the motion here is in effect seeking to retry or exploit issues of the Rosenberg case rather than direct itself to the issues before us". We submit that the court was in error. The respondents submitted a substantial meritorious brief directed to the issues on appeal and were at least successful on the copyright appeal aspect of the appeal—an adeqate response to the panel's mistaken view of respondents' motion.*

* That many members of the legal community and public are concerned upon the FBI disclosures regardirg Judge Kaufman's conduct, and are publicly disseminating those facts in the media is their proper prerogative, but does not bear upon the issues in this petition presented to this Court. See *Meeropol, applicants* v. *Nizer et al.*, 50 L.Ed. 2d 729, Application A-543, January 18, 1977 and papers in support thereof.

It is the petitioners, not the respondents, who are seeking to inject political issues, and red herrings, in these proceedings and by their scurrilous and base attacks are attempting to prejudice the courts against the respondents. It is the petitioners who seek to obscure the substantial issues and respondents' valid claims and who resort to any tricks, deceptions, lies and groundless claims, to avoid or delay at all costs the day they must proceed to trial before a court and jury and be compelled to testify under oath.

The petitioners should not be permitted to abuse the processes of this Court and taint the record with such false, scurrilous and scandalous claims having no foundation in the files and records of the case. This portion of their petition should be stricken, and costs imposed upon petitioner's.

CONCLUSION

The petition for a writ of certiorari should be denied and pages 7 through 12 of the petition should be stricken and the petitioners be taxed with costs.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-608

LOUIS NIZER, DOUBLEDAY & CO., INC. and FAWCETT PUBLICATIONS, INC.,
Petitioners,

v.

MICHAEL MEEROPOL and ROBERT MEEROPOL,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

As demonstrated in the petition for certiorari this case presents for review a novel question which has never been decided by this Court. That question is the extent to which an author who has written on a matter of great public and historical interest and in support of his presentation has made limited use of copyrighted original source materials, must subordinate his First Amendment rights and the

corresponding right of the public to be fully informed, to the interest of a copyright proprietor, particularly one who is using the Copyright law to suppress the author's opinion. Respondents' Brief In Opposition actually underscores the need for certiorari to resolve the question of the relationship between the Copyright law and the First Amendment. The facts which squarely present that issue remain undisputed.

The Facts Which Raise the First Amendment Question Are Not in Dispute.

The facts demonstrate the respondents have been using the Copyright law and this lawsuit to suppress petitioners' opinion that the Rosenbergs received a fair trial. Respondent launched a nationwide campaign to reopen their parents' conviction by bringing this lawsuit. (See pages 7 through 12 of the petition for certiorari). It is therefore these pages which squarely present the question of the relationship between the First Amendment and the Copyright law which is the subject of this petition. Yet, respondents attempt to strike these very pages. It is highly significant that respondents' motion to strike does not put in issue any of the facts set forth on these pages which support the conclusion that petitioners are using the Copyright law for ulterior purposes but only the conclusion itself.

However, that conclusion is not only the petitioners', it is the one reached by the Court of Appeals for the second Circuit and the United States District Court for the Southern District upon the evidence. It is these Courts that have already found that through the medium of this action

respondents were "seeking to retry issues of the Rosenberg case rather than direct [themselves] to the issues" and "that what is really desired [by respondents] is a trial of the accuracy and fairness of defendants' book and its implicit conclusion that the controversial Rosenberg trial was fair" (petition for cert. pp. 10-11).

Furthermore, it is equally significant that respondents have not disputed the facts which demonstrate that quotation from the letters themselves are important to any historical study of the Rosenberg case. Thus, respondents do not deny that the letters involved herein were written by the Rosenbergs for the express purpose of calling the attention of the world to the alleged injustice of their conviction and sentence of death and that they were never intended to be the private correspondence of two anonymous individuals. Nor do petitioners dispute the fact that it is the form of expression used in the letters by the authors which provides the emotional impact which Julius and Ethel Rosenberg sought to achieve, and that without the form of expression that emotional impact is lost.

Accordingly, the facts of this case squarely present the type of situation with respect to which Professor Nimmer believed that First Amendment considerations required that the interest of the copyright proprietor be subordinated. Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L.Rev. 1180 (1970).

Respondents Have Distorted the Record Facts and Misinterpreted the Decision by the Court of Appeals.

In an effort to blunt the impact of the First Amendment questions raised by the petition, respondents have distorted the record facts in order to create the impression that this case is not yet ripe for review by the Court. Actually, the record is more than complete to resolve the important constitutional question involved herein.* While it is not petitioners' intention to correct every misstatement contained in respondents' brief, those misstatements which bear on the amount of the alleged copying and the marketability and commercial exploitability of *Death House Letters* cannot remain uncorrected.

Thus, for example, respondents' statement that the "copyrighted letters" appear in the "last 125 pages" of *The Implosion Conspiracy* (Brief, p. 5) is patently false. The fact is, that all of the challenged excerpts appear on parts of only seventeen pages, between pages 393 and 439, of petitioners' book (210a). Similarly, respondents' attempt to increase the amount of the respondents' claim by an additional 1058 words (Brief, p. 6n) is untrue. These additional excerpts come principally from a petition for executive clemency which was never the subject of Copyright, and a letter, neither of which was ever printed in *Death House Letters*. They are simply not involved in this case.

* Contrary to the statement at page 7 of respondent's brief, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, —— U.S. ——, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977) does *not* bear "upon the need and the right to protect copyrighted property in the face of a First Amendment claim." Indeed, that case did not even involve a copyright claim.

Equally baseless is the respondents' statement that sales of *Death House Letters* throughout the world numbered in the "hundreds of thousands" (Brief, p. 4). The veracity of that statement is best judged by the fact that it is not accompanied by any citations to the record. The fact remains that the only record of sales of *Death House Letters* are those of its long-dissolved publisher, Jero Publishing Co., and its alleged successor (The Rosenberg Children's Trust Fund). These records, already in evidence, demonstrate that the total gross income from sales of *Death House Letters* was only $12,000 and that no sales have occurred since 1956 (220-21a).

In addition to misstating the record, respondents have misinterpreted the decision of the Court of Appeals in an effort to create issues of fact where none exist. Thus, the Court of Appeals did not hold that the "district court had erred in finding as a matter of fact" that the alleged copying was "insubstantial" (Brief, p. 7). The Court of Appeals only held that as the trier of the facts with respect to petitioners, Nizer and Doubleday, the District Court had erred in upholding the defense of fair use "in the absence of evidence on the question of damages" (A21).* As demonstrated (petition pp. 22-24) respondents never submitted any evidence on this issue to counter petitioners' conclusive showing in this regard. Consequently, the District Court's judgment should have been affirmed on factual findings. If this Court were to find that the Circuit Court erred in this respect, under well-established principles of collateral estoppel, any finding of fact by the District Court

* Nor do the six "issues" itemized by respondents at pages 6-7 of their brief come from the Court of Appeals decision as they are made to appear. Indeed, the last three "issues" are really one and the same.

in connection with the case against Nizer and Doubleday would also bind respondents with respect to their case against Fawcett, even though in that case respondents have demanded a jury. See, *Shore* v. *Parkland Hosiery Inc.*, —— F.2d ——, slip op. pp. 157-175 (2d Cir. November 1, 1977).

This Court Should Grant the Petition and Determine the Relationship Between the First Amendment and the Copyright Law.

Nothwithstanding respondents' protestations to the contrary, the petition for certiorari presents constitutional and federal questions of sufficient importance within the meaning of Rule 19 to warrant review by this Court. Furthermore, although the specific constitutional question was not raised in the answers filed by the petitioners as an affirmative defense to the Copyright Count, it was raised by the District Court opinion and briefed by petitioners in the Court of Appeals. That is sufficient to preserve it for review by this Court. *Cf. Jenkins* v. *Georgia,* 418 U.S. 153, 157 (1974).*

Just what limitations the First Amendment imposes upon the Copyright law will be fully discussed in the brief on the merits. However, a number of possibilities are readily apparent.

First, this Court could decide that where, as here, a copyright proprietor is using the Copyright laws for the purpose of suppressing the First Amendment right of an

* In addition, many of the facts which support the constitutional defense surfaced *after* the answers to the complaint had already been filed. Moreover, the answers did assert the defense of fair use, a defense which is related to the First Amendment issue.

author to express his opinion on a matter of public interest as well as the public's constitutional right to be informed, his proprietary interest must be subordinated. In such a case, a claim of statutory copyright infringement would have to be dismissed regardless of the amount of copying or the potential impairment of the value of the copyrighted material. (See petition for cert., p. 14.)

Second, this Court could hold that where, as here, the defendant's work is one of public interest, as determined by the Court from a reading thereof, there is an immunity from the Copyright law for quantitatively insubstantial copying, and all other elements of the traditional defense of fair use are to be disregarded. (See petition, page 18.) Since the Circuit Court did not disturb the District Court's finding as the trier of the facts of quantitatively insubstantial copying, such a test would necessarily result in a judgment for the petitioners.*

Third, this Court could hold that where the copyrighted material (including the form in which it is expressed) is of legitimate "public interest," the potential impairment of its commercial exploitability by the allegedly infringing work should be disregarded in determining the applicability of the defense of fair use. This is an approach suggested by Professor Nimmer. Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. Rev. 1180, 1201 (1970). The application of such an approach to the facts of this case would again necessarily result in a dismissal of the com-

* As stated earlier, any determination by the District Court as the trier of the facts with respect to Nizer and Doubleday would be entitled to collateral estoppel effect in the action against Fawcett.

plaint since the decision by the District Court as the trier of the fact was reversed solely for its alleged failure to take evidence on the potential impairment of the commercial exploitability of *Death House Letters* as a result of *The Implosion Conspiracy.*

Fourth, this Court could hold that where, as here, the defendant's work is one of public interest, as determined by the Court from a reading thereof, the use by the defendant is presumptively "fair." The plaintiffs would have the opportunity to show by clear and convincing evidence that the elements of the fair use defense have not been met. Thus, in effect, the burden of proof would be shifted to the plaintiffs who would be required to prove an "unfair use" in order to prevail. Once again, such a test would require a dismissal of the complaint herein since the decision by the District Court as the trier of the facts was affirmed in all respects except for the failure to take evidence on the issue of damages. As above indicated (page 5), the respondents offered no evidence on the issue of damages in opposition to the petitioners' documented demonstration of no possible damage. Accordingly, the respondents would have failed to meet their burden of proof under this test.

Fifth, adopting a more limited approach, this Court could hold that where the material copied was written by a public figure who has since died, and an author-defendant's work is one of the public interest as determined by the Court from a reading thereof, a quantitatively insubstantial usage is not an infringement. This would make the Copyright law somewhat analogous to the right of privacy, which ends at death. Once again, such a test would lead to

dismissal since the District Court's finding as the trier of the facts that the amount of copying was insubstantial was not disturbed by the Court of Appeals.

Undoubtedly, there are other possible formulations which, upon certiorari, the Court and counsel could analyze and which would also provide a proper balance between the legitimate interests of the copyright proprietor and the mandate of the First Amendment.

Conclusion

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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